UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PRIDDIS MUSIC, INC.,

Plaintiff,

- against -

05-CV-0491
DNH/DRH

TRANS WORLD ENTERTAINMENT CORPORATION,

Defendant.

COPIES OF CASES REPORTED EXCLUSIVELY ON COMPUTERIZED DATABASES

(IN THE ORDER THAT THEY APPEAR IN THE MEMORANDUM OF LAW)

Dated: October 2, 2006

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Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court,N.D. New York.
CONSTRUCTIVE HANDS, INC. f/k/a David Sior d/b/a Constructive Hands, Plaintiff,
v.
Tim B. BAKER and Unnamed 40 Ketch, her sails, engine, appurtenances, etc., in rem, Defendants.
No. 1:04-CV-0939 (LEK/RFT).

Aug. 8, 2006.

Background: Boat repairer action against vessel and its owner to recover amounts due for repairs and supplies. Owner filed counterclaim to recover for alleged decrease in vessel's value due to repairer's faulty work. Bench trial was held.

Holdings: The District Court, Kahn, J., held that:

(1) repairer adequately alleged maritime lien;

(2) repairer had valid oral contract with owner for repair of vessel and supply of materials and necessaries; and

(3) repairer was not entitled to recover its attorney fees and costs.

Judgment for plaintiff.

[1] Admiralty 16 🔑10(1)

16 Admiralty
16I Jurisdiction
16k9 Contracts
16k10 Maritime Contracts in General
16k10(1) k. Jurisdiction in General. Most Cited Cases
All maritime contracts are within federal district court's admiralty jurisdiction. 28 U.S.C.A. § 1333.

[2] Admiralty 16 🔑10(1)

16 Admiralty
16I Jurisdiction
16k9 Contracts
16k10 Maritime Contracts in General
16k10(1) k. Jurisdiction in General. Most Cited Cases
Question whether contract is maritime or not depends on its subject matter, not on place where it is made.

[3] Admiralty 16 🔑10(2)

16 Admiralty
16I Jurisdiction
16k9 Contracts
16k10 Maritime Contracts in General
16k10(2) k. Nature of Contract in General. Most Cited Cases
If contract relates to ship or to commerce on navigable waters, it is subject to maritime law, and is within federal district court's admiralty and maritime jurisdiction, whether contract is to be performed on land or water. 28 U.S.C.A. § 1333.

[4] Admiralty 16 🔑28

16 Admiralty
16II Remedies and Procedure in General
16k28 k. Grounds of Proceeding in Rem. Most Cited Cases
In rem jurisdiction in admiralty context only exists for enforcement of maritime lien.

[5] Maritime Liens 252 🔑56

252 Maritime Liens
252III Enforcement
252III(A) In Admiralty
252k55 Nature and Form of Remedy
252k56 k. In General. Most Cited Cases

Claims for maritime lien may be maintained both in rem against vessel and in personam against owner.

[6] Admiralty 16 ⚿2

16 Admiralty
16I Jurisdiction
16k2 k. Saving of Common-Law Remedy. Most Cited Cases

Courts 106 ⚿489(1)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k489 Exclusive or Concurrent Jurisdiction
106k489(1) k. In General. Most Cited Cases

Federal courts have exclusive admiralty jurisdiction in matters concerning in rem actions for enforcement of maritime liens. 28 U.S.C.A. § 1333.

Federal courts have exclusive admiralty jurisdiction in matters concerning in rem actions for enforcement of maritime liens. 28 U.S.C.A. § 1333.

[7] Maritime Liens 252 ⚿64

252 Maritime Liens
252III Enforcement
252III(A) In Admiralty
252k64 k. Pleading. Most Cited Cases

Boat repairer adequately alleged maritime lien against vessel, and thus repairer's action against vessel and its owner fell within district court's admiralty jurisdiction, even though it did not cite relevant statute, where repairer claimed that it furnished supplies and repairs to vessel upon its owner's orders, for which owner did not pay in full. 28 U.S.C.A. § 1333; 46 U.S.C.A. § 31342.

[8] Maritime Liens 252 ⚿25

252 Maritime Liens
252I Nature, Grounds, and Subject-Matter in General
252I(B) Under Statutory Provisions
252k25 k. Services, Supplies, Repairs, or Materials. Most Cited Cases

In order to establish maritime lien, plaintiff must show that: (1) it furnished repairs, supplies, or other necessaries, (2) to vessel, (3) upon order of vessel's owner or person authorized by owner. 46 U.S.C.A. § 31341.

[9] Contracts 95 ⚿326

95 Contracts
95VI Actions for Breach
95k326 k. Grounds of Action. Most Cited Cases

Essential elements of breach of contract claim are: (1) formation of agreement by offer, acceptance, and consideration; (2) performance by one party; (3) breach of agreement by other party; and (4) damages.

[10] Frauds, Statute of 185 ⚿49

185 Frauds, Statute of
185V Agreements Not to Be Performed Within One Year or During Lifetime
185k48 Possibility of Performance
185k49 k. In General. Most Cited Cases

Oral contract for repair of vessel could have been fully performed within one year, and thus was not barred by statute of frauds.

[11] Maritime Liens 252 ⚿25

252 Maritime Liens
252I Nature, Grounds, and Subject-Matter in General
252I(B) Under Statutory Provisions
252k25 k. Services, Supplies, Repairs, or Materials. Most Cited Cases

Boat repairer had valid oral contract with owner for repair of vessel and supply of materials and necessaries, and thus owner and vessel were liable for unpaid amounts and interest, despite disagreement as to repairer's hourly rate and interest on unpaid amounts, where owner made visits to repairer's shop, inspected vessel from time to time, spoke with repairer regarding work performed on vessel, paid repairer $81,450 for work performed on vessel, and did not instruct repairer to cease work up until their dispute, and repairer charged owner its standard rate.

[12] Interest 219 ⚷39(2.25)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.25) k. Admiralty and Maritime Matters. Most Cited Cases
In admiralty cases, prejudgment interest should be granted in absence of exceptional circumstances.

[13] Admiralty 16 ⚷121

16 Admiralty
16XIII Costs
16k121 k. Power to Award in General. Most Cited Cases
General rule in admiralty actions is that award of attorney fees and costs is discretionary with district judge upon finding of bad faith.

[14] Admiralty 16 ⚷121

16 Admiralty
16XIII Costs
16k121 k. Power to Award in General. Most Cited Cases
Boat repairer was not entitled to recover attorney fees and costs it incurred in its successful action to recover amounts due for repairing vessel and supplying it with necessaries, where vessel owner paid significant portion of repairer's bills, and repairer did not allege that owner acted in bad faith.

Kevin J. Keelan, Office of Kevin J. Keelan, Mamaroneck, NY, for Plaintiff.
James A. Resila, Carter, Conboy Law Firm, Albany, NY, for Defendants.

MEMORANDUM-DECISION AND ORDER FN1
KAHN, District Judge.

I. Jurisdiction

*1 Federal Courts have original jurisdiction of claims arising under admiralty and maritime jurisdiction.
In its most pertinent part, 28 U.S.C. § 1333 provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: ... [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."... Admiralty jurisdiction, in a breach of contract action, arises only when the " subject-matter of the contract is 'purely' or 'wholly ' maritime in nature."

SAT Int'l Corp. v. Great White Fleet (US) Ltd., No. 03 Civ. 7481(KNF), 2006 WL 661042, at *4 (S.D.N.Y. Mar.16, 2006) (citations omitted). Furthermore, it should be noted that 28 U.S.C. § 1331 does not provide this Court with a second source of jurisdiction, as admiralty cases do not arise under "federal question" jurisdiction. *Id.* at *5. Article III of the United States Constitution extends "judicial power" to three classes of cases: (i) "cases in law and equity, arising under this constitution, the laws of the United States, and treaties," (ii) " cases affecting ambassadors, or other public ministers and consuls," and (iii) "cases of admiralty and maritime jurisdiction."... "The constitution certainly contemplates these as three distinct classes of cases"; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over the other two. The discrimination made between them, in the constitution, is ... conclusive against their identity."... An admiralty case does not "arise" under the Constitution or the laws of the United States.... Rather, admiralty provides an independent source of subject matter jurisdiction for admiralty actions."

In re Millenium Seacarriers, Inc., 419 F.3d 83, 101 (2d Cir.2005) (citing and quoting, *inter alia*, U.S. Const., art. III; *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 545-46, 7 L.Ed. 242 (1828); *Paduano v. Yamashita*, 221 F.2d 615 (2d Cir.1955)).

[1][2][3] All maritime contracts are within admiralty jurisdiction. *Netherlands Am. Steam Navigation Co. v. Gallagher*, 282 F. 171, 176 (2d

Cir.1922). And, in considering the nature of a disputed contract, "[t]he question whether a contract is maritime or not depends in this country simply on the subject-matter of the contract, and not on the place where the contract is made.... If a contract relates to a ship or to commerce on navigable waters, it is subject to the maritime law, and is within the admiralty and maritime jurisdiction, whether the contract is to be performed on land or water." *Id.* at 175.

[4][5][6] Furthermore, *in rem* jurisdiction in the admiralty context only exists for the enforcement of a maritime lien. See *Rainbow Line, Inc. v. M/V Tequila,* 480 F.2d 1024, 1027-28 (2d Cir.1973) (citing, *inter alia, The Resolute,* 168 U.S. 437, 440, 18 S.Ct. 112, 42 L.Ed. 533 (1897); *The Rock Island Bridge,* 6 Wall. 213, 73 U.S. 213, 215, 18 L.Ed. 753 (1867)). Maritime liens fall within admiralty jurisdiction. 2 AM. JUR. 2D *Admiralty* §§ 50, 125 (2005) (Section 50 comments, in part: "Admiralty jurisdiction embraces petitory as well as possessory suits. *It extends to maritime liens,* various maritime service claims, ... and sundry other matters.... Generally, the *maritime nature of the subject matter is the criterion of admiralty jurisdiction.*") (footnotes omitted; emphasis added). Claims for a maritime lien may be maintained both *in rem* against the vessel, and *in personam* against the owner. *See, generally, American Oil Trading, Inc. v. M/V SAVA,* 47 F.Supp.2d 348 (E.D.N.Y.1999); *O'Hara Corp. v. F/V North Star,* 212 B.R. 1 (D.Me.1997); *Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa, SA,* Nos. 90 Civ. 6396(VLB), 91 Civ. 1539(VLB), 1994 WL 130007, at *2 (S.D.N.Y. Apr. 7, 1994) ("Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.") (citing *Belcher Co. v. M/V Maratha Mariner,* 724 F.2d 1161, 1163 (5th Cir.1984)). *See also* Thomas J. Schoenbaum, 1 Admiralty & Maritime Law § 3-2, at 61 (2d ed.1994).[FN2] Federal courts have exclusive admiralty jurisdiction in matters concerning *in rem* actions for the enforcement of maritime liens. *See* Schoenbaum, *supra,* § 3-2, at 60-61.

*2 The alleged lien in this matter arises out of a contract that relates directly to necessaries, repair and construction work performed on a boat.

The district courts have subject matter jurisdiction in such cases under Article III of the Constitution, implemented by 28 U.S.C. § 1333 and by 46 U.S.C. § 31342, which provides for maritime suits for failure to pay for necessaries to be provided to a vessel.... The Supreme Court has recently made it clear that *admiralty jurisdiction embraces all matters relating to use, support or maintenance of navigable vessels.*

Robert E. Derecktor, Inc. v. Norkin, 820 F.Supp. 791, 792-93 (S.D.N.Y.1993) (Broderick, D.J.) (emphasis added) (Court held that it had subject matter jurisdiction over case arising out of claim for failure to pay for repairs to vessel, and counterclaim for overcharges) (citing, *inter alia, N. Pac. S.S. Co. v. Hall Bros.,* 249 U.S. 119, 39 S.Ct. 221, 63 L.Ed. 510 (1919); *McDermott Int'l v. Wilander,* 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991); *Exxon Corp. v. Cent. Gulf Lines,* 500 U.S. 603, 111 S.Ct. 2071, 114 L.Ed.2d 649 (1991)). *See also Compania Argentina De Navegacion Dodero v. Atlas Maritime Corp.,* 144 F.Supp. 13, 14 (S.D.N.Y.1956) ("... contracts providing for the repair of a particular ship or for supplies for a particular ship have been held to be within the maritime jurisdiction of the Federal Courts.") (citing cases); 2 C.J.S. *Admiralty* § 48 (2005) ("A contract for furnishing supplies or making repairs to a vessel is within admiralty jurisdiction, even though the vessel, ready for service, has not entered service, is not in active service, or is afloat, in dry dock or hauled up upon land. Thus, a contract to make repairs to a vessel is governed by maritime law rather than by local law.") (footnotes omitted).

[7] Rule C(1) of the *Supplemental Rules for Admiralty and Maritime Claims* of the *Federal Rules of Civil Procedure* provides, in relevant part: " [a]n action in rem may be brought: (a) To enforce any maritime lien; [or] (b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto." Fed.R.Civ.P., Supp. R. C(1) for Admiralty & Maritime Claims. As this Court has previously discussed, and still holds to be true, if the plaintiff does not contend that a lien exists under federal statute, then "they must

establish the existence of a maritime lien to support *in rem* jurisdiction." *Garcia v. M/V Kubbar,* 4 F.Supp.2d 99, 103 (N.D.N.Y.1998) (Kahn, D.J.). In doing so, the Court would have to resort to an extensive evaluation under substantive law. *Id.* However, in the present matter, Plaintiff alleges-albeit without citing the federal statute in the Complaint-all of the elements necessary for a finding of a maritime lien under federal statute. See Verified Complaint (Dkt. No. 1). Plaintiff alleges that it furnished supplies and repairs to Defendant vessel upon the orders of the owner of the vessel, Defendant Baker, for which Defendant Baker did not pay in full, and that Federal jurisdiction exists pursuant to 28 U.S.C. § 1333. [FN3] *Id.* Federal law provides that:

*3 (a) ... a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner-

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

46 U.S.C. § 31342. *See also Norkin,* 820 F.Supp. at 791; *M/V SAVA,* 47 F.Supp.2d at 351 ("There is no dispute that [plaintiff] has satisfied the requirements of the Liens Act by furnishing necessaries, ... to the [defendant vessel] upon the order of the time charterer of the Vessel.").

This Court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1333 and Rule 9(h) of the *Federal Rules of Civil Procedure,* as this case concerns claims arising from a maritime contract and maritime lien under maritime and admiralty law. *See* 28 U.S.C. § 1333(1); Fed.R.Civ.P. 9(h); Verified Complaint (Dkt. No. 1) at ¶ 1.

II. Standard of Law

[8] This action involves claims arising from an alleged contract for services to a boat. Plaintiff is claiming to possess a lien. Therefore,

[i]n order to prove a maritime lien under the statute, [Plaintiff] must show (1) that it furnished repairs, supplies or other necessaries, (2) to the vessel, (3) upon the order of the owner of the vessel or a person authorized by the owner under 46 U.S.C. § 31341.... The term "necessaries" includes "repairs, supplies, towage, and the use of a dry dock or marine railway." 46 U.S.C. § 31301(4). Courts have interpreted "necessaries" to include "any goods and services 'reasonably needed' in a ship's business for a vessel's continued operation."

GMD Shipyard Corp. v. M/V ANTHEA Y, No. 03 Civ.2748 RWS, 2004 WL 2251670, at *6 (S.D.N.Y. Oct.6, 2004) (Sweet, D.J.) (citations omitted). *See also Newport News Shipbuilding and Dry Dock Co. v. S.S. Independence,* 872 F.Supp. 262, 266 (E.D.Va.1994) ("[t]o enforce its maritime lien ... plaintiff must show: (1) that plaintiff performed services on the vessel; (2) that charges for those services were reasonable; (3) that services were 'necessaries,' as defined by 46 U.S.C. § 31301(4); and (4) that the person who placed the order had the real, apparent or statutorily presumed authority to do so.") (citing *S.E.L. Maduro (Florida), Inc. v. M/V ANTONIO de Gastaneta,* 833 F.2d 1477, 1482 (11th Cir.1987)).

This Court will evaluate Plaintiff's claims under the Maritime Commercial Instruments and Liens Act ("MCILA") (46 U.S.C. § 31301, *et seq.*), formerly the Federal Maritime Lien Act ("FMLA"), and the related federal statutory and case law. *See Norkin,* 820 F.Supp. 791; *Newport News,* 872 F.Supp. 262. Although the FMLA was recodified in 1988, and replaced with the MCILA, prior case law is instructive and applicable. *See ANTHEA Y,* 2004 WL 2251670, at *6.

[9] To the extent the Court considers any related issue of breach of contract for the supply of necessaries, the Court recognizes the prevailing State law and general common law elements for breach of contract from New York law, as recognized by Federal courts, and will keep an eye to those. "The essential elements of a breach of contract claim are: (1) the formation of an agreement by an offer, acceptance, and consideration; (2) performance by one party; (3) breach of the agreement by the other party; and (4) damages." *Engler v. Cendant Corp.,* No. 04-CV052159(ADS)(MLO), 2006 WL 1408583, at

*11 (E.D.N.Y. May 23, 2006) (citing, *inter alia, First Investors Corp. v. Liberty Mut. Ins. Co.,* 152 F.3d 162, 169 (2d Cir.1998); *Kaplan v. Aspen Knolls Corp.,* 290 F.Supp.2d 335, 337 (E.D.N.Y.2003)).

III. Discussion

***4** Following a bench trial that took place over three days, and after review of the record, the submissions of the parties, and the trial exhibits, the Court makes the following findings.

A. Findings of Fact & Conclusions of Law

Defendant Timothy Baker ("Defendant Baker") is the owner of Defendant Vessel (previously "40' Unnamed Ketch", but now known as "Royal Arc II"), bearing engine number 2-1913-211518. See Verified Complaint (Dkt. No. 1) at ¶ 3; TR II (Dkt. No. 38) at 147 [FN4]; Plntf's Prop. Find. of Fact & Concl. of Law (Dkt. No. 44) at ¶ 4. Defendant Baker contracted with Plaintiff for work to be performed on Defendant vessel-namely maintenance, repair work, alterations, work to allow the vessel to be sailed in the ocean, and the like-at several different times beginning in 1999. *See, inter alia,* TR I (Dkt. No. 37) at 11-16. The vessel was already in the water by 1998-99, and Defendant had frequently sailed in it. *See id.* at 13; TR II (Dkt. No. 38) at 149-50. The work Plaintiff undertook was to, *inter alia,* correct issues pertaining to the survey of the boat in 1999. See TR II (Dkt. No. 38) at 151-56. Defendant Baker had paid Plaintiff in full for the work performed at earlier times in 1999 and 2000, and that earlier work is not at issue in the current lawsuit. *See* TR I (Dkt. No. 37) at 12, 14, 19. This lawsuit concerns work performed from January 2002 through September 2002. *Id.* at 16.

Plaintiff brought this action to recover the unpaid remainder on the bills for the work performed, labor undertaken, materials supplied, interest accrued, sales taxes paid, and prejudgment interest. *See* Verified Complaint (Dkt. No. 1); Plntf's Prop. Find. of Fact & Concl. of Law (Dkt. No. 44); Plntf's Post-Trial Brief (Dkt. No. 45) at 2. Defendant Baker brought a counterclaim seeking what he alleges is the decrease in value of the vessel from the time period before Plaintiff worked on the boat until the time period after said work-alleging that poor workmanship by Plaintiff substantially decreased the value and seaworthiness of the vessel. *See* Answer (Dkt. No. 4); TR III (Dkt. No. 39) at 219-20.

Plaintiff maintained a notebook and other rudimentary documentation, keeping records of the work performed on Defendant vessel, materials purchased [FN5], costs accrued, and hours for labor. *See* Plntf's Post-Trial Brief (Dkt. No. 45) at 2; TR I (Dkt. No. 37) at 25-30 (& Plntf's Trial Exs. 1 & 4). The notebook, although not a model of clarity, sets forth hours worked, material costs, balances due for each month of work, and payments made by Defendant Baker and credited to the account. *See* Notebook, Plntf's Trial Ex. 4.

[10] As far as the existence of a contract in this matter, the Court finds that a contract or agreement for the work performed by Plaintiff did exist between the parties. Despite its oral nature-with hardly any writing at all between the parties-the Court notes oral contracts that may be fully performed within one year, or which actually are performed within one year, are generally excluded from the operation of the Statute of Frauds. *See* Restatement (Second) of Contracts § 130 & cmt. a. *See, generally, Cron v. Hargro Fabrics, Inc.,* 91 N.Y.2d 362, 367-68, 670 N.Y.S.2d 973, 694 N.E.2d 56 (1998); *D & N Boening, Inc. v. Kirsch Beverages, Inc.,* 63 N.Y.2d 449, 483 N.Y.S.2d 164, 472 N.E.2d 992 (1984); *P.J. Carlin Constr. Co. v. Whiffen Elec. Co., Inc.,* 66 A.D.2d 684, 411 N.Y.S.2d 27 (1st Dep't 1978). In the case at bar, the Court finds that it was possible and plausible for Plaintiff to have completed all contracted-for work on Defendant vessel within one year, depending on staffing level (*see* TR I (Dkt. No. 37) at 20), speed of work and Defendant Baker's necessary payments within that same time period.[FN6] Furthermore, the United States Supreme Court has recognized that "it is an established rule of ancient respectability that oral contracts are generally regarded as valid by maritime law." *Kossick v. United Fruit Co.,* 365 U.S. 731, 734, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961).

FN7

*5 The Court will now consider the terms and performance of the contract. Photographs were taken of Defendant vessel following some of Plaintiff's work. Those photographs were admitted into evidence during the trial. *See* TR I (Dkt. No. 37) at 79-81, 96-99. *See also* Plntf's Trial Exs. 5(A)-(C); Defts' Trial Exs. 15(B)-(F). At one point in this litigation, Defendants attempted to display the photographs of "blueing" as an example of poor workmanship which voided Defendants' responsibilities to pay under the contract. But, Plaintiff has explained the blueing occurrence to the satisfaction of this Court. The welding of the port lights was done correctly, and "blueing ... [is] a reaction of heat on the stainless steel along with oxygen from the air.... [I]t's a discoloration. But it's standard. It happens to all metals, with the exception of aluminum...." TR I (Dkt. No. 37) at 73-74. *See also* Plntf's Post-Trial Brief (Dkt. No. 45) at 4. Furthermore, during his testimony at trial, Plaintiff demonstrated that he had an understanding of what could damage a vessel, and he demonstrated that he would want to avoid such damage. "You can remove [blueing] with a wire brush. But depending on the application-in this case, these are a high polished port light, which, one you wouldn't want to take the blueing off with a wire brush because you would scratch the surface, and when you polish it later, it would be more difficult.... [In addition] [b]lueing is not any kind of damage. It's a completely natural thing." TR I (Dkt. No. 37) at 74-75. Instead, Plaintiff testified that buffing would remove the blueing effect from the steel, and forever replace the blueing with a polished finish-thus resulting in no damage to the vessel from the blueing. *Id.* at 92-93.

It is noted that according to Plaintiff, Defendant Baker, between January and September 2002, paid Plaintiff eighty-one thousand four hundred and fifty dollars ($81,450.00) for work performed on Defendant vessel. Plntf's Prop. Find. of Fact & Concl. of Law (Dkt. No. 44) at ¶ 13. In fact, according to Plaintiff, Defendant Baker paid Plaintiff close to eighty-one percent of the outstanding bills prior to the commencement of this lawsuit. *See* Plntf' s Post-Trial Brief (Dkt. No. 45) at 2 ("Plaintiff invoiced Defendant Baker $100,861.04 for labor, materials and sales tax, and Defendant Baker has made payments of $81,450.00. ") (citing Plntf's Trial Ex. 2). However, this lawsuit concerns the unpaid balance due to Plaintiff, plus interest and sales tax, and prejudgment interest. Defendant Baker did not submit records, receipts or cancelled checks to demonstrate payments he made to Plaintiff, but Defendant Baker believes that he actually paid Plaintiff somewhere around ninety or one hundred thousand dollars. See TR III (Dkt. No. 39) at 225-226. Defendant Baker testified that he could estimate what had been paid from memory of events-several years earlier. *Id.*

*6 Furthermore, the Court notes that Defendant Baker made visits to Jeff's Yacht Haven and Plaintiff's shop, where the vessel was located, and, *inter alia,* inspected the vessel from time to time, spoke with Plaintiff regarding work performed on the vessel, and made payments to Plaintiff-including significant payments of sometimes fourteen thousand dollars ($14,000) or twenty thousand dollars ($20,000) in one month. *See* TR III (Dkt. No. 39) at 230-37; Defts' Post-Trial Brief (Dkt. No. 42) at 3. The evidence and record clearly demonstrate that Plaintiff and Defendant worked together, Defendant Baker authorized Plaintiff's work and expenditures, and that, at least for the first eighty-one thousand dollars of payments Defendant Baker did not dispute the work, and did not instruct Plaintiff to cease and desist any work up until the time of this dispute. In fact, often Defendant did not even ask for, and did not receive, receipts from Plaintiff.[FN8] TR III (Dkt. No. 39) at 230-31. Defendant Baker complains that no bills, invoices, or receipts for materials-in effect no writings-were produced by Plaintiff, and contends, therefore, that the Court should not allow the claimed costs as Plaintiff performed unauthorized work. *See* Defts' Post-Trial Brief (Dkt. No. 42); Defts' Prop. Find. of Fact & Concl. of Law (Dkt. No. 43). Yet, Plaintiff testified that he always discussed work and repairs with Defendant Baker before any undertaking, *see* TR II (Dkt. No. 38) at 120; and the Court recognizes that Defendant Baker made significant and substantial payments to Plaintiff in early and mid-2002. In reviewing the record and submissions, the Court finds that Defendant Baker's actions in early and mid-2002 simply do not correspond with what one would expect of someone who is unhappy with work being performed on an expensive vessel, or of someone who is unhappy with the business practices of the person performing the work.

[11] This is an unfortunate case, given the significant lack of written agreements, invoices, and the like between the parties. However, the Court finds, based upon the record, the trial testimony, the evidence and the pleadings of the parties, that a contract existed between the parties to this action-Plaintiff and Defendant Baker-for the performance of repair and construction work, supply of materials, and supply of other necessaries to Defendant vessel at issue in the present suit. Said necessaries were supplied at the request of, and under order from, the owner of Defendant vessel-Defendant Baker-as was understood by Plaintiff.

The issue of cost for labor under the contract remains to be determined. According to Plaintiff, the contract's terms included, *inter alia,* a "list" of substantial work and materials, and a rate for labor of fifty-five dollars ($55.00) per hour for work performed by Plaintiff-a rate which was posted in Plaintiff's place of business. *See* TR I (Dkt. No. 37) at 17-18, 20; Plntf's Prop. Find. of Fact & Concl. of Law (Dkt. No. 44) at ¶ 8. Defendants, however, have argued that the agreed-upon rate was only forty dollars ($40) per hour. *See* TR II (Dkt. No. 38) at 162; Defts' Post-Trial Brief (Dkt. No. 42) at 1-2; Defts' Prop. Find. of Fact & Concl. of Law (Dkt. No. 43) at ¶ 2. Plaintiff has explained the discrepancy, testifying that a rate of around forty-five to forty-eight dollars ($45-$48) per hour had been charged for the earlier work, performed in 1999 and 2000. *See* TR II (Dkt. No. 38) at 116. Defendant has acknowledged that the $40 rate argued for was charged for the work performed prior to 2001. *See* Defts' Post-Trial Brief (Dkt. No. 42) at 2. But, costs for work on a boat can and do increase over time.

*7 As Plaintiff testified at both a prior deposition and at trial, the rate for the work in 2002 was fifty-five dollars ($55) per hour; Plaintiff had charged this rate to Defendant Baker; Defendant Baker had paid at that rate; and the rate was posted in Plaintiff's shop-in which Defendant Baker had spent time. *See* TR II (Dkt. No. 38) at 139-40. In fact, reviewing the Notebook (Plntf's Trial Ex. 4) it appears that from the first entry on page one, Plaintiff charged Defendant for labor at a rate of $55 per hour, and the Notebook reflects payment of certain sums by Defendant Baker for a number of months-indicating to this Court that Defendant Baker consented to the charges. *See, inter alia,* Notebook, Plntf's Trial Ex. 4, at 1-2, 7. The Court, therefore, accepts Plaintiff's testimony, and the rate of $55 per hour as the prevailing contract rate in this matter.

In addition, Plaintiff has stated that he had an established interest rate for overdue bills of 1.5% per month (18% per annum), corresponding to invoices, business practice, and a sign posted at Plaintiff's place of business. *See* TR II (Dkt. No. 38) at 118; Plntf's Prop. Find. of Fact & Concl. of Law (Dkt. No. 44) at ¶ 14; Plntf's Post-Trial Brief (Dkt. No. 45) at 3. Defendants argue that the issue of an interest rate was never discussed between the parties. *See* Defts' Post-Trial Brief (Dkt. No. 42) at 1-2; Defts' Prop. Find. of Fact & Concl. of Law (Dkt. No. 43) at ¶ 2. Based upon a review of the record and testimony, however, the Court finds in favor of Plaintiff on this point, as well, and finds that an interest rate of 1.5% per month (18% per annum) is applicable to the contract/agreement at issue.[FN9]

Given the discussion above, it is the conclusion of this Court that Defendant Baker has breached the contract between himself and Plaintiff. Defendant owes the remainder of the outstanding sums billed, and failure to pay said sums has led to the existence of a maritime lien on Defendant vessel. Plaintiff has established that said lien exists, and that the underlying sums are owed to Plaintiff. Furthermore, Defendant vessel does not appear to be as physically damaged, or lessened in value, as Defendant Baker claims. Plaintiff has explained what needs to be done to remedy some of the problems, including the blueing, and Plaintiff has not been permitted to complete his work on the vessel, and the vessel has been in dry-dock, due to Defendant Baker refusing further payment under the agreement, and Plaintiff's need to pursue this lawsuit. If Plaintiff had been permitted to complete the work that was begun, and if Defendant had furnished full payment as required, the Court finds that the vessel would still be seaworthy and would not be considered damaged.

[12] **Therefore, the Court finds in favor of Plaintiff, and denies Defendants' Counterclaim.** Defendants shall pay damages to Plaintiff in the amount of twenty-four thousand four hundred and five dollars and eighty-three cents ($24,405.83) in principal owed. Furthermore, "[i]n admiralty cases prejudgment interest 'should be granted in the absence of exceptional circumstances.' " *M/V SAVA,* 47 F.Supp.2d at 353 (citing and quoting *Magee v. United States Lines, Inc.,* 976 F.2d 821, 822 (2d Cir.1992)). Generally, district courts have broad discretion in determining both the interest rate to be used and the date from which the calculations will run for prejudgment interest. *See M/V SAVA,* 47 F.Supp.2d at 353 ("[i]t is within the broad discretion of the district court to determine the rate of interest and the date on which it commences ....") (citing, *inter alia, Independent Bulk Transp., Inc. v. Vessel "MORANIA ABACO",* 676 F.2d 23, 27 (2d Cir.1982); *Standard Marine Towing Services, Inc. v. M.T. DUA MAR,* 708 F.Supp. 562, 569 (S.D.N.Y.1989); *McCrann v. United States Lines, Inc.,* 803 F.2d 771, 774 (2d Cir.1986)). However, Plaintiff requests a prejudgment interest rate of 1.5% per month. Plntf' s Prop. Find. of Fact & Concl. of Law (Dkt. No. 44) at 5; Plntfs Post-Trial Brief (Dkt. No. 45) at 6-7. This Court will grant that interest rate. Therefore, prejudgment interest shall be calculated at the rate of 1.5% per month (18% per annum), from March 2004 through the date of the judgment.

***8** In addition, if Defendants should fail to pay said amounts owed within sixty (60) days from the filing date of the judgment, Defendant vessel shall be seized and sold by the United States Marshal so as to recover the amounts owed. However, if the sale of said vessel shall not suffice to repay all monies owed pursuant to the judgment, Defendant Baker shall still be liable for the remainder, *in personam.*

B. Fees and Charges for Storage of Defendant Vessel

The request for storage fees for Jeff's Yacht Haven is no longer at issue, given the stipulation, on the record, that storage charges and fees are no longer claimed by Plaintiff. *See* Minute Entry (Dkt. No. 33) at 1; TR II (Dkt. No. 38) at 138-139.

C. Costs and Attorney's Fees

[13] Plaintiff seeks costs and attorney's fees. Generally, parties bear their own costs of litigation. However, "[t]he general rule in admiralty actions is that such an award 'is discretionary with the district judge upon a finding of bad faith.' " *Fortis Corp. Ins., S.A. v. M/V CIELO DEL CANADA,* 320 F.Supp.2d 95, 108 (S.D.N.Y.2004) (Lynch, D.J.) (citing and quoting *Ingersoll Milling Mach. Co. v. M/V Bodena,* 829 F.2d 293, 309 (2d Cir.1987)). *See also New York Marine & Gen. Ins. Co. v. Tradeline (L.L.C.),* 266 F.3d 112, 130 (2d Cir.2001).

[14] While the Court acknowledges that Plaintiff has prevailed in this action, the Court does not find bad faith on the part of Defendants. This is a case of a dispute over payment for the supply of necessaries-which arises from an unwritten contract between the parties. As stated in the discussion above, Defendant Baker had rendered payment for a significant portion of the bills as charged by Plaintiff prior to Plaintiff bringing the present action concerning the dispute over the remaining bills. In addition, Plaintiff has not specifically alleged or argued that Defendant Baker acted in bad faith. Thus, with no finding of particular bad faith on the part of Defendants, the Court denies Plaintiff's request for costs and attorney's fees. *See also Eurosteel Corp. v. M/V KOGGEGRACHT,* No. 01Civ.7731(DLC)(FM), 2003 WL 470575, at *4 (S.D.N.Y. Jan. 20, 2003) (citing cases), *Report and Recommendation Adopted by,* No. 01 Civ. 7731(DLC), 2003 WL 1872652 (S.D.N.Y. Apr.11, 2003).

The Court also denies attorney's fees in this action as the claim was brought as a maritime lien. In such a situation, other courts have similarly denied

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attorney's fees requests for *in rem* suits because "[a]ttorneys' fees are not 'necessaries' as defined by the Liens Act." *M/V SAVA,* 47 F.Supp.2d at 353 (citing, *inter alia, Bradford Marine, Inc. v. M/V SEA FALCON,* 64 F.3d 585 (11th Cir.1995)).

IV. Conclusion

Therefore, based on the foregoing discussion, it is hereby

ORDERED, that the Court **FINDS IN FAVOR OF PLAINTIFF;** and it is further

ORDERED, that Defendants' Counterclaim (Dkt. No. 4) is **DENIED;** and it is further

*9 **ORDERED,** that Defendants shall pay damages to Plaintiff in the amount of **TWENTY-FOUR THOUSAND FOUR HUNDRED AND FIVE DOLLARS AND EIGHTY-THREE CENTS ($24,405.83) in principal owed;** and it is further

ORDERED, that Plaintiff's request for pre-judgment interest is **GRANTED.** Prejudgment interest shall be **calculated at the rate of ONE AND ONE-HALF PERCENT (1.5%) per month (18% per annum), from March 2004 through the date of the judgment;** and it is further

ORDERED, that if Defendants fail to pay said amounts owed within SIXTY (60) DAYS of the filing date of the judgment, Defendant vessel shall be seized and sold by the United States Marshal so as to recover the amounts owed. However, if the sale of said vessel shall not suffice to repay all monies owed pursuant to the judgment, Defendant Baker shall still be liable for the remainder, *in personam;* and it is further

ORDERED, that Plaintiff's request for storage fees for Jeff's Yacht Haven is **DENIED AS MOOT;** and it is further

ORDERED, that Plaintiff's request for costs and attorney's fees is **DENIED;** and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

FN1. For printed publication by the Federal Reporters.

FN2. *In personam* jurisdiction may be invoked if Plaintiff establishes that the court has personal jurisdiction over the named defendant in the action. *See* Schoenbaum, *supra,* § 3-2, at 61. Such jurisdiction is established in this case, given that Defendant Baker has submitted to the jurisdiction of this Court throughout the pre-trial and trial proceedings. *See Robertson v. United States,* No. 1:03-CV-1459 (LEK), 2005 WL 1173545, at *3 (N.D.N.Y. May 4, 2005) (Kahn, D.J.) (concerning *habeas corpus* petition from criminal conviction, but noting that "[p]ersonal jurisdiction, unlike subject matter jurisdiction, is waivable in both civil and criminal trials.... A defendant waives any future challenge to personal jurisdiction by appearing in court and failing to object to the jurisdiction over his person.") (citing, *inter alia, United States v. Rosenberg,* 195 F.2d 583, 603 (2d Cir.1952); *Pon v. United States,* 168 F.2d 373, 374 (1st Cir.1948)). *See also* Fed.R.Civ.P. 12(h). Defendant Baker is also a resident of this State, and contracted for work performed on his boat in this judicial District. *See* Verified Complaint (Dkt. No. 1) at ¶¶ 3, 5-7; Answer (Dkt. No. 4) at ¶ 1 (denying allegations in ¶¶ 5, 7, 8 & 9 of the Complaint, but not ¶ 6 that concerns work contracted for, provided, and at issue in this case).

FN3. Also see Plaintiff's Proposed Findings of Fact and Conclusions of Law (Dkt. No. 44), wherein Plaintiff asserts a claim specifically falling under 46 U.S.C. § § 31301, *et seq.*

FN4. "TR" refers to the Trial Transcript.

There were three days of testimony, so the first day will be cited as "TR I", the second day as "TR II", and the third day as "TR III".

FN5. Including a certain number of receipts for materials. *See* Plntf's Trial Ex. 3.

FN6. In fact, the Court notes that Defendants attempt to argue that the work should have taken three (3) months. See Defts' Prop. Find. of Fact & Concl. of Law (Dkt. No. 43) at ¶ 2.

FN7. In a related vein, nuncupative (oral or unwritten) wills of mariners and sailors at sea are deemed valid, and will be probated, under certain circumstances-thus receiving different treatment in the law of trusts and estates. *See In re Mason's Will,* 121 Misc. 142, 200 N.Y.S. 901, 905 (Surr. Ct. Kings County 1923) (soldiers and seamen are considered part of "privileged classes" in this area of law); N.Y. Est. Powers & Trusts Law § 3-2.2; 95 C.J.S. *Wills* § 340 (2006); N.Y. Practice *Trusts & Estates* § 3:157 (2005).

FN8. The Court notes that Defendant Baker is an educated man-a forensic psychologist. *See* TR II (Dkt. No. 38) at 147. As such, the Court finds that he is knowledgeable in the ways of business and billing for services.

FN9. It is noted that amidst the evidence presented at trial is Plaintiff's Exhibit 2-spreadsheets showing monthly charges, accrued costs, and prior balances, as well as notations indicating a rate of $55 per hour for labor, and a 1.5% monthly interest rate applicable to all bills more than five (5) days old. *See* Plntf's Trial Ex. 2. The Court recognizes that Plaintiff has argued that the 1.5% interest rate is "usual business practice", *see* Plntf's Prop. Find. of Fact & Concl. of Law (Dkt. No. 44) at ¶ 14, and, indeed, the rate mirrors provisions found on the receipts of other businesses, such as Spinnenweber Supply Company and Fall Steel, Inc., *see* Plntf's Trial Ex. 3.

N.D.N.Y.,2006.
Constructive Hands, Inc. v. Baker
--- F.Supp.2d ----, 2006 WL 2270376 (N.D.N.Y.)

Briefs and Other Related Documents (Back to top)

- 2006 WL 812179 (Trial Motion, Memorandum and Affidavit) Closing Statement Letter Brief (Feb. 10, 2006)
- 2006 WL 812180 (Trial Motion, Memorandum and Affidavit) Plaintiff's Post-Trial Memorandum of Law (Feb. 10, 2006)
- 1:04cv00939 (Docket) (Aug. 6, 2004)

END OF DOCUMENT

Westlaw.

C
Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court,E.D. New York.
Jordan S. JOSEPHSON and Jordan S. Josephson, M.D., P.C., individually and on behalf of all others similarly situated, Plaintiffs,
v.
EMPIRE BLUE CROSS AND BLUE SHIELD, Defendant.
No. 04-CV-3647(JS)(ETB).

Sept. 28, 2005.

Lee Squitieri, Squitieri & Fearon, LLP, New York, New York, for Plaintiffs.
Kimberly C. Lawrence, Hinman Straub, P.C., Albany, New York, for Defendant.

MEMORANDUM & ORDER
SEYBERT, J.
*1 On August 23, 2004, Plaintiff Jordan S. Josephson ("Plaintiff or "Josephson") commenced a putative class action against Defendant Empire Blue Cross and Blue Shield ("Defendant" or "Empire") alleging that Defendant failed to honor valid assignments of medical benefits by its policy holders to healthcare providers. Pending before the Court is Defendant's motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons explained below, Defendant's motion is GRANTED.

BACKGROUND

The following facts have been taken from the Complaint and are presumed true for the purposes of this motion.

In 1995, Ann Cohen commenced a class action on behalf of Empire healthcare plan subscribers, challenging the methodology Empire used in calculating reimbursement for services rendered by non-participating healthcare providers. (Compl.¶ ¶ 13-20.) The putative class period in the *Cohen* action ranged from 1989 to September 1996. *See Ann R. Cohen, et al. v. Empire Blue Cross and Blue Shield,* No. 95-CV-4553 (TCP) (E.D.N.Y.). In 2002, the *Cohen* action was settled. As part of the *Cohen* Settlement Agreement, the class plaintiffs' claims were dismissed with prejudice and Empire agreed to pay $21,633,238.00 ("Additional Reimbursement Monies") to a fund for class claimants. (Compl.¶ 25.)

Plaintiff in this action is a medical service provider. He alleges that he, and other medical service providers ("Provider Assignees"), hold valid assignments of the claims of certain of the *Cohen* plaintiffs-specifically, participants in Empire's " TraditionPlus Wraparound," "Wraparound Plus" and "Tradition Plus" policies. (Compl.¶ 8.) According to Plaintiff, Empire was on notice of the Provider Assignees' assignments, and it previously was Empire's business practice to honor such assignments by tendering payment of benefits directly to the Provider Assignees. (Compl.¶¶ 21-23.)

Plaintiff claims that he and the other Provider Assignees are entitled to a portion of the *Cohen* Settlement, but are being denied monies due. (Compl.¶¶ 3, 25-28.) Plaintiff alleges that, because Empire had notice of the assignments of benefits, the *Cohen* settlement "could not purport or attempt to settle and extinguish" his claims or the claims of the other Provider Assignees. (Compl.¶ 24.) In seeming contrast to this position, however, Plaintiff defines the putative class as "all Provider Assignees under Defendant Empire's individual and group health insurance policies [the "Contracts"] *who were part of the certified class and settlement class in the Cohen Action."* (Compl. ¶ 11 (emphasis added).)

Plaintiff alleges that Empire has "failed and refused to [remit the Additional Reimbursement Monies] despite notice of such assignment and demand for payment thereunder." (Compl.¶ 5.) Instead, Plaintiff asserts that Empire has "has wrongfully tendered ... payment[s] to the settlement class members in the *Cohen* action." (Compl.¶ 31.) Plaintiff has not sought to claim any funds directly from the *Cohen* settlement fund administrator because he was informed by Empire personnel that any attempt would be futile. (Compl.¶ 28.)

*2 On August 23, 2004, Plaintiff commenced this putative class-action, alleging claims for: (1) breach of contract; (2) monies due under assignment; and (3) violation of N.Y. Insurance Law § 3224-a (" Prompt Pay Law"). Plaintiff seeks damages, on behalf of himself and the rest of the putative class, in the amount of "at least ... $21,633,238.00." (Compl.¶ 27.)

Empire has moved to dismiss the Complaint as barred by the Settlement Agreement, the statute of limitations, and res judicata. In addition, Empire argues that all claims must be dismissed because none of the putative class plaintiffs can possibly hold valid assignments. Finally, Empire contends that Plaintiff's claim under the New York's Prompt Pay Law must be dismissed because that statute does not provide for a private right of action.

LEGAL STANDARD

A district court should grant a motion to dismiss only if " 'it is clear that no relief could be granted under any set of facts that could be proved consistent with allegations." ' *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 249-50, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (quoting *Hishon v. King & Spaulding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)). In applying this standard, a district court must "read the facts alleged in the complaint in the light most favorable" to the plaintiff and accept these factual allegations as true. *Id.* at 249; *see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 165, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)(noting the Federal Rules' liberal system of notice pleading).

In deciding a motion to dismiss, the district court's duty "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Sims v. Artuz,* 230 F.3d 14, 20 (2d Cir.2000); *see also Goldman v. Belden,* 754 F.2d 1059, 1067 (2d Cir.1985). The appropriate inquiry, therefore, is not whether a plaintiff's claims are ultimately meritorious, but whether the plaintiff is entitled to offer evidence to support them. *See Ricciuti v. New York City Transit Auth.,* 941 F.2d 119, 123-24 (2d Cir.1991) (plaintiff is not compelled to prove his or her case at the pleading stage).

A plaintiff is not required to set out in detail the facts upon which he or she bases a claim. *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). A plaintiff need only give a statement of his or her claim that will give the defendant "fair notice of what the ... claim is and the grounds upon which it rests." *Id.* Therefore, where a complaint is filed that charges each element necessary to recover, the dismissal of the case for failure to set out evidential facts can seldom be warranted. *See U.S. v. Employment Plasterers' Ass'n,* 347 U.S. 186, 189, 74 S.Ct. 452, 98 L.Ed. 618 (1954).

However, allegations that are so baldly conclusory that they fail to give notice of the basic events and circumstances of which a plaintiff complains are meaningless as a practical matter and, as a matter of law, are insufficient to state a claim. *See Barr v. Abrams,* 810 F.2d 358, 363 (2d Cir.1987).

DISCUSSION

*3 Defendant argues that the Plaintiff's claims are barred because the Contracts at issue contain anti-assignment clauses. According to the Defendant, the anti-assignment clauses preclude the Plaintiffs from assuming any rights as assignors of the Contracts. Plaintiff contends that the anti-assignment clause was either waived or not absolute. This Court finds that, despite the Plaintiff's contentions, the Contracts were not assigned. Thus, there are no rights that could inure to the Plaintiff and this case must be dismissed.

By their own admission, the Plaintiff's action is based on their rights as assignees of the Contracts. In order for the Plaintiff to maintain any action whatsoever there must be some relationship between the parties. *See Conroy v. Ford Motor Corp.,* 147 A.D .2d 885, 887, 538 N.Y.S.2d 110 (3d Dep't 1989). Here, the relationship between the Plaintiff and the Defendant is based on Contracts which specifically state that assignment is not permitted. Plaintiff, however, asserts that the anti-assignment clause of the Contracts was either waived or it was not absolute.[FN1]

FN1. Both parties cite to, and interpret, *Brandoff v. Empire Blue Cross and Blue Shield,* 183 Misc.2d 936, 707 N.Y.S.2d 291 (N.Y. Civ.Ct., N.Y. County 2000). The *Brandoff* case is not akin to the case presented here. Here, there are Contracts that contain certain clauses specifically relating to anti-assignment and waiver. In *Brandoff,* the court could not determine whether, or not, the contact contained an anti-assignment clause. The situation here is very different.

Due to the actions of the Defendant, Plaintiff claims that there were waivers of the anti-assignment clauses. Plaintiff correctly states that anti-assignment clauses in health insurance contracts can be waived. *See Brandoff,* 183 Misc.2d 936. Despite Plaintiff's assertion, this argument fails because of another contractual claim.

Within the Contracts at issue there is another clause which states "[i]f the claim is for the services of only one provider and the fee has not been paid, the payment may go to the provider or to you, at our option." Thus, Defendant asserts even if there were payments made directly to one, or more, of the purported class members there was no general waiver of the anti-assignment clauses. This Court agrees.

To interpret the Contracts in any other manner would be to render one of the clauses of the Contracts meaningless. The Second Circuit Court of Appeals has instructed the district courts to interpret contracts such that all provisions have meaning. *See Summer Communications, Inc. v. Three A's Holding, L.L.C.,* No. 97-CV-9095, 1999 U.S.App. LEXIS 3174, at *2 (2d Cir. Feb. 26, 1999). This Court must interpret the Contracts at issue in such a way so that all of the provisions have meaning. Here, the only way in which the Contracts can be interpreted is to find that Defendant had the ability at its "option" to assign the payment. It was completely up to Defendant when, and to what extent, to waive the anti-assignment clause. The alleged fact that Defendant did so does not constitute a broad waiver sufficient to make Plaintiff an assignee.

Furthermore, Plaintiff's argument that the anti-assignment clauses were not absolute fails. As discussed above, the anti-assignment clause may not have been absolute to the extent that Defendant desired to waive the clause. However, that fact does not establish that the anti-assignment clause was not absolute. The language of the Contracts at issue does not permit this case to proceed. Defendant had a right to waive the anti-assignment clause at their option and, as alleged, did so. Even assuming that Defendant did, at times, waive the anti-assignment clauses, such waiver was limited to those instances.

*4 Having found that the Plaintiff is not an assignee of the Contracts at issue his claims must fail. The Court does not, at this time, make any ruling as to the other grounds for dismissal of Plaintiff's claims. It is noted, however, that there may be merit in Defendant's other arguments. Briefly, if Plaintiff is in the class, and was not a part of the class action, whatever claims he has are barred by the express terms of the *Cohen* settlement. Plaintiff makes some argument-contained solely in his opposition to the motion to dismiss-that he did not receive notice of a class action and, thus, was denied due process rights. This Court does not make any findings as to this argument but notes that failure to receive notice of the class action is not contained in the Complaint. Moreover, no law has been identified by either party, or this Court, that stands for the proposition that a potential assignee must receive notice of a class action.

If Plaintiff is not in the class, he is time barred as not having commenced this action within the statute of limitations. Plaintiff argues that the statute has not run because of when the *Cohen* settlement was funded. Inherently, this argument does not seem to make sense because if the Plaintiff is not in the class he cannot receive any funds from the *Cohen* settlement. Thus, this argument would also likely fail. However, the merits of any arguments other than the lack of a valid assignment are not decided herein.

CONCLUSION

For the reasons explained above, Plaintiff's Complaint is hereby DISMISSED. The Plaintiff is unable to assert this action because he is not an assignee of any rights from the Contracts at issue.

The Clerk of the Court is directed to mark this case as CLOSED.
SO ORDERED

E.D.N.Y.,2005.
Josephson v. Empire Blue Cross and Blue Shield
Not Reported in F.Supp.2d, 2005 WL 2413638 (E.D.N.Y.)

Briefs and Other Related Documents (Back to top)

• 2:04cv03647 (Docket) (Aug. 23, 2004)

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Briefs and Other Related Documents
NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a " Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA2 s 0.23 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Second Circuit.
SUMMER COMMUNICATIONS, INC. d/b/a Inverted Records, Plaintiff-Appellant,
v.
THREE A's HOLDING, LLC. d/b/a Bayside Distribution, and M.T.S., Inc. d/b/a Tower Records, Defendants-Appellees.
No. 97-9095.

Feb. 26, 1999.

Appeal from the United States District Court for the Southern District of New York (Preska, Judge).

Randall M. Cutler, Cutler & Sedlmayr, New York, New York, for Appellant.
H. Nicholas Goodman, Quirk and Bakalor, (James M. Andriola, of counsel), New York, New York, for Appellees.

Before WINTER, Chief Judge, and GRAAFEILAND and PARKER, Chief Judges.

SUMMARY ORDER[FN*]

FN* THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

*1 Summer Communications, Inc. d/b/a Inverted Records ("Inverted") appeals from an adverse judgment following a bench trial before Judge Preska. Inverted alleged that Three A's Holding, LLC d/b/a Bayside Distribution ("Bayside") returned undistributed and unsold product to Inverted contrary to the terms of their contract. We affirm.

We agree with Judge Preska's interpretation of the contract. The contract unambiguously permits Bayside to return product to the appellant, and this right of return is not inconsistent with any of the other contract provisions. Furthermore, the contract is wholly consistent with industry practice. Finally, the transaction is one for "sale or return" under the Uniform Commercial Code ("U.C.C.").

Paragraph 8(d) of the contract unambiguously states, "Distributor shall have the right to credits on account of one-hundred percent (100%) return privileges." Giving this provision its plain meaning does not conflict with any other contract provision, including paragraphs 5(a) and (b) and paragraph 8(a). *See Muzak Corp. v. Hotel Taft Corp.,* 1 N.Y.2d 42, 150 N.Y.S.2d 171, 133 N.E.2d 688, 690 (N.Y.1956) (rules of contract construction require interpretation that gives meaning to every contract provision or, in the negative, no provision should be left without force or effect); *see also Garza v. Marine Transp. Lines, Inc.,* 861 F.2d 23, 27 (2d Cir.1988); *Rothenberg v. Lincoln Farm Camp, Inc.,* 755 F.2d 1017, 1019 (2d Cir.1985).

Paragraphs 5(a) and (b) establish Bayside's right to settle disputes with and to accept returns from its retailers. These provisions merely allow retailers to return product to Bayside and not directly to appellant. Bayside's right to then pass on these returns to the appellant is, therefore, neither affected by nor inconsistent with these provisions.

Paragraph 8(a) requires "a minimum first order, to be accompanied by a non-revocable purchase order. " In other words, Bayside must place a minimum first order that it cannot rescind. It is not disputed that Bayside in fact placed a minimum first order and never sought to rescind it. Appellant, however, argues that if we recognize Bayside's return privileges under paragraph 8(d), paragraph 8(a) would be rendered meaningless. The shoe is on the other foot, however. It is appellant's interpretation of 8(a) that would wholly ignore the clear language of paragraph 8(d), rather than the other way around. A requirement of a minimum first order is simply not inconsistent with an unfettered right of return. Had the parties intended that Bayside either not be able to return product from the initial order or to do so only in five years at the end of the contract, they could easily have spelled that condition out in paragraph 8(d).

This reading of paragraph 8(d) is wholly consistent with industry practice. To be sure, a court need not consider trade practices or evidence of custom when, as here, the contract is unambiguous. *See Western Union Tel. Co. v. American Communications Ass'n, C.I.O.*, 299 N.Y. 177, 86 N.E.2d 162, 166 (N.Y.1949); *Cable-Wiedemer, Inc. v. Friederich and Sons Co.*, 71 Misc.2d 443, 445, 336 N.Y.S.2d 139 (N.Y.Co.Ct.1972). However, for the district court to have done so is not reversible error.

*2 U.C.C. § 2-202(a) provides that usage of trade may be relied upon to explain or supplement the written version of terms agreed to by the parties. *See also Schubtex, Inc. v. Allen Snyder, Inc.*, 49 N.Y.2d 1, 424 N.Y.S.2d 133, 399 N.E.2d 1154, 1156 (N.Y.1979) (evidence of trade usage may normally supplement express terms of contract for sale of goods). Usage of trade is defined by U.C.C. § 1-205(2) as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." It is not necessary for both parties to be conscious of the trade usage; it is enough for the trade usage to "justify an expectation" of its observance. U.C.C. § 1-205(2); *see also id.* § 1-205(3) (any usage of trade in vocation or trade in which contract parties are engaged or of which parties are *or should be aware* give meaning to, supplement, or qualify terms of agreement); *Record Club of America, Inc. v. United Artists Records, Inc.*, No. 72 Civ. 5235(WCC), 1991 WL 73838 at *10 n. 9 (S.D.N.Y. Apr.29, 1991) (under U.C.C., party engaged in vocation or trade in question is presumed to have requisite knowledge).

The district court found that, in the record industry, product that cannot be placed with or sold by retailers may be returned by the distributor, here Bayside, to the label, appellant, for refund or credit. Furthermore, there are no preconditions on the distributor's return of product. Distributors are not required either to wait the length of the contract term, here five years, or even to have product returned by retailers before tendering returns for refund or credit. The court found the record industry usage of trade based in large part on the " credible and very persuasive" testimony of an expert witness. We give particularly strong deference to findings based on credibility. *See Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 64 (2d Cir.1992).

Finally, paragraph 8(d) is entirely consistent with U.C.C. § 2-326(1), which states, "Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is ... 'a sale or return' if the goods are delivered primarily for resale." There is no dispute that the goods here were delivered entirely for resale. The official comment to the U.C.C. explains that a "sale or return" is "a sale to a merchant whose unwillingness to buy is overcome only by the seller's engagement to take back the goods (or any commercial unit of goods) in lieu of payment if they fail to be resold." U.C.C. § 2-326(1)(b), Official Comment, Purposes of Changes ¶ 1. The situation discussed by the commentary precisely describes the record industry.

Appellant further contends that the district court erred in dismissing its action for breach of implied covenant of good faith and fair dealing. We affirm that dismissal for substantially the reasons stated by the district court.

***3** We therefore affirm.

C.A.2 (N.Y.),1999.
Summer Communications, Inc. v. Three A's Holding, LLC
175 F.3d 1008, 1999 WL 106216 (C.A.2 (N.Y.))

Briefs and Other Related Documents (Back to top)

- 97-9095 (Docket) (Sep. 04, 1997)

END OF DOCUMENT

C
Briefs and Other Related Documents

United States District Court,N.D. New York.
Paul J. HUDSON, as personal representative of the Estate of Eleanor Hudson, Plaintiff,
v.
INTERNAL REVENUE SERVICE, Defendant.
No. 03-CV-172.

March 25, 2004.

Paul S. Hudson, Office of Paul J. Hudson, Crofton, MD, pro se.
Bartholomew Cirenza, Washington, DC, for Defendant.

DECISION & ORDER
MCAVOY, Senior J.

I. INTRODUCTION

***1** This tax case arises from an assessment of trust fund recovery penalties pursuant to 26 U.S.C. § 6672 against Plaintiff Eleanor Hudson,[FN1] and the Internal Revenue Service's ("Defendant" or "IRS") attempt to collect these penalties and accrued interest. Plaintiff filed this action seeking judicial review of the IRS's Notice of Determination issued in the collection proceeding. This case is now before the Court on the parties' cross-motions that, for the reasons discussed *infra,* are treated as motions for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. For the reasons stated below, Defendant's motion is denied, and Plaintiff's cross-motion is granted in part and denied in part.

FN1. Eleanor Hudson commenced this action *pro se* on February 10, 2003. After she passed away, her son, Paul J. Hudson, was appointed as the personal representative of her estate, and the Estate was substituted in the caption in this action. The Estate is represented by Ms. Hudson's husband, Paul S. Hudson, who is an attorney admitted to practice law in the State of New York and admitted *pro hac vice* in this matter.

II. BACKGROUND [FN2]

FN2. The following facts are taken from the Complaint unless indicated otherwise.

The IRS issued tax assessments against Plaintiff as a responsible person for a trust fund penalty arising from an audit for 1989 and 1990 of a corporation known as Kent & Haroldsen Associates, Inc., which filed for bankruptcy in 1995 in U.S. Bankruptcy Court in Albany, New York in a case known as *In re Kent & Haroldsen Associates, Inc.,* Case No. 95-10607.

Compl. ¶ 5.

As a result of this trust fund penalty, the IRS filed tax liens against Plaintiff's property "in the amount of approximately $500,000." *Id.* at ¶ 6. Plaintiff " duly appealed the IRS assessment administratively to the IRS" and, in December of 1999 in the context of *In re Kent & Haroldsen Associates, Inc.,* she and her husband "entered into a written stipulation of settlement agreement with" the IRS that limited her total liability to $30,838.49. *Id.* at ¶ 7. This " Stipulation of Settlement Agreement" ("the Agreement") is attached to the Complaint as Exhibit A and bears the caption of *In re: Kent & Haroldsen, Debtor,* Case No. 95-10607. *See* Compl., Ex. A. It begins: "The parties Paul Hudson, Eleanor Hudson, Marc Ehrlich and chapter 7 trustee for Kent and Haroldsen, Inc., and the Internal Revenue Service by its representative as set forth below do hereby agree and stipulate as follows...." *Id.* Paragraph "A" of the Agreement deals with the "total tax liability of Kent and Haroldsen." *Id.* Following several tax calculations set forth in the document, paragraph A concludes with a "Summary" which provides, *inter alia:* "$30,838.49 - Trust Fund Portion of the $43,348.58 'Full Rate' tax." *Id.*

Paragraph B of the Agreement, which deals with the Hudsons, states in its entirety:

B. The total Trust Fund portion of said tax will be $30,838.49. The total liability of Eleanor and Paul Hudson shall be the trust fund portion.

Id.

Under the statement "So Agreed" are the dated signatures of "Diane Cagino, AUSA, For Internal Revenue Service," "Richard Croak, Attorney for Eleanor and Paul Hudson," and "Marc Ehrlich, Chapter 7 Trustee." *Id.* The signatures are dated 12/28/99, 2/29/99,[FN3] and 12/20/99, respectively. *Id.* The Agreement was approved by the "the bankruptcy court, and duly filed with the bankruptcy court clerk on January 3, 2000." Compl. ¶ 8. However, the

FN3. The Court presumes that Richard Croak's signature was affixed on 12/29/99, not 2/29/99 as Exhibit A appears to indicate.

*2 IRS unlawfully and wrongfully added interest and penalties and other charges to the settlement amount subsequent to the settlement date, in the amount of approximately $30,000. The settlement makes no mention of the such interest or penalty and such was unknown to [Plaintiff] or [she] would not have agreed to the settlement. The IRS has ignored [Plaintiff's] requests that they eliminate such interest and penalties and comply with the settlement.

Id. at ¶ 9.

In December 2001, the IRS levied against Plaintiff's bank account and "otherwise engaged in collection actions" against her. *Id.* ¶ 10. She requested an administrative appeal hearing in December 2001 " before the IRS Appeals office in Philadelphia, Pennsylvania, and [her] bank account that had been wrongfully levied against was unfrozen by the IRS." *Id.* at ¶ 11. Nonetheless, in December 2002 "while waiting for the IRS to schedule a hearing," Plaintiff learned that "the IRS had received overpayments from [her] and Paul S. Hudson as well as taking certain New York State tax refunds that were owed to [her] of approximately $37,000, which far exceeded the total amount owed to the IRS under the December 1999 settlement stipulation." *Id.* ¶ 12. Plaintiff asserts that when she

provided this information [to the] IRS appeals office and to the Albany IRS office with a detailed schedule of overpayments and requested 60 days to have this matter resolved by the insolvency section of the Albany IRS office in December 2002, the IRS appeals officer instead summarily denied [Plaintiff's] appeal without ever holding a hearing and gave [Plaintiff] notice dated January 13, 2003 that she was returning the matter to the IRS Collections branch to begin a new collection activity against [Plaintiff] for $58,433, unless [Plaintiff] filed a petition with the U.S. District Court within 30 days.

Id. ¶ 13.

A copy of the IRS' January 13, 2003 "Notice of Determination" is attached as Exhibit B to the Complaint.[FN4] It provides the following under the " Summary and Recommendation" section:

FN4. In its Answer, Defendant "avers that there is a document attached to the complaint as Exhibit 'B' entitled Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330. " Ans. ¶ 13. As discussed *infra,* Defendant submits the Declaration of Internal Revenue Service Appeals Officer Judith Hornstein in which she declares that, on January 3, 2003, she made the initial determination "to sustain collection action taken by the Internal Revenue Service and prepared determination correspondence for review." Hornstein Decl., ¶ 9. Defendant does not attach the document to which Hornstein refers, but argues in its Supplemental Memorandum of Law that review in this case is limited to the appeal of Hornstein's Determination dated January 13, 2003. *See* Def. Suppl. Mem. Law, p. 2. Given the fact that Paragraph 13 of the Answer does not constitute an outright denial of the fact that Exhibit B is a true and accurate copy of Hornstein's January 13, 2003, and given further Hornstein's declaration and the arguments of Defendant, the Court will deem Defendant's improper response in its Answer at Paragraph 13 to be an admission that Exhibit B is a true and accurate copy of the operative Determination in this case. *See* Fed. R. Civ. P. 8(b).

The taxpayer requested a hearing before Appeals under the provisions of Internal Revenue Code section 6320 for the tax period. As of the transcript dated 4/23/02, the taxpayer owed approximately $58,433 for the tax period ending 12/31/90.
The taxpayer writes that she is not liable for this liability. She also sent a claim for Innocent Spouse and an Offer in Compromise.
It is recommended that the case be returned to the Collection Function for appropriate action.

Compl., Ex. B.

As is evident, the "Summary and Recommendation" section provides no elaboration as to the basis that Plaintiff asserted that she was not "liable for this liability," and the "Discussion and Analysis" section of this document provides nothing further in this regard. This section provides:
A taxpayer may not be allowed innocent spouse status for a trust fund penalty.
*3 The taxpayer has withdrawn her request for an offer in compromise.
The Collection Division's position is that levy action is necessary because the taxpayer will not pay the amount owed.

Id.

Plaintiff further contends in the Complaint that her husband had requested the IRS to apply his tax overpayments to the "outstanding principal in the settlement agreement," but the IRS refused to do so. *Id.* at ¶ 14.[FN5]

FN5. It appears from the allegations in the complaint that Paul S. Hudson is litigating the propriety of this same tax debt in his bankruptcy proceeding. Compl. ¶ 14; *see In re Paul S. Hudson,* U.S. Bankruptcy Case, Northern District of New York, Case No. 00-11683. Magistrate Judge Treece's June 4, 2003 Order required the parties to advised the Court immediately if a ruling " related to this matter" was made by the Bankruptcy Judge. *See* Order, dkt. # 7. Inasmuch as the parties have not advised this Court of a decision by the Bankruptcy Judge in this regard, the Court presumes that none has been made.

Plaintiff requests that this Court (1) declare that the claims of the IRS against Eleanor R. Hudson are paid in full; (2) discharge and release any IRS liens against Eleanor R. Hudson's property; (3) order the IRS to refund any overpayments and refunds, plus interest, that should have been paid to Eleanor R. Hudson for tax years 1997 through 2001; (4) order the IRS to provide the Court and the Plaintiff a detailed accounting of all charges and assessments against Eleanor R. Hudson, and of the application of any overpayments and tax payments made by Eleanor R. Hudson and Paul S. Hudson for tax years 1994 through 2001; (5) order the IRS to suspend collection activity against the property of Eleanor R. Hudson; and (6) to enter a judgment for costs and expenses as allowed by law.

The IRS has answered the Complaint asserting certain defenses which are addressed more fully below. *See* Ans., dkt. # 4; IV(c), *infra.* Nonetheless, the IRS "admits that a Stipulation of Settlement of Claims was entered in connection with the bankruptcy case of debtor Kent and Haroldsen ... but denies plaintiff's interpretation of such stipulation." *Id.* ¶ 7. Defendant further "[a]dmits that the subject stipulation was executed by an Assistant U.S. Attorney for the Northern District of New York, but denies that such stipulation is binding as against the United States as to the issue of whether plaintiff Eleanor Hudson is responsible for accrued interest on the Trust Fund Recovery Tax Penalty from the date of assessment until fully paid." *Id.* at ¶ 8.

These motions followed.

II. RULE 12(c)

A. Treatment of Cross-Motions Pursuant to Rule 12(c)

On September 4, 2003, Defendant filed a motion " for an order Affirming the Determination of the IRS Appeals Office concerning collection action." Dkt. # 12. In support of this motion, Defendant filed a Memorandum of Law (dkt.# 13) and an Attorney Declaration with two exhibits attached thereto. *See* Cirenza Decl. (attached to Def.'s Mem. of Law. dkt. # 13). There is no foundation for the admission of the documents attached to the Government's attorney's declaration.[FN6]

FN6. It should also be noted that in opposition to Plaintiff's cross-motion and in reply to Plaintiffs opposition to Defendant's motion, Defendant file an Opposition/Reply Memorandum of Law. *See* Dkt. # 17. Attached to this document are two exhibits: (1) a letter from the IRS to an accountant (designated as Government's Exhibit C), and (2) the Declaration of Internal Revenue Service Appeals Officer Judith Hornstein (designated as Government's Exhibit D). There is no legal foundation laid for the admissibility of the letter, "Exhibit C."

Given that Defendant's moving Memorandum of Law makes legal arguments based upon the facts as Defendant deems them to be, the motion is in the nature of one seeking summary judgment. *See* Mem. of Law, pp. 1-4 (setting forth "Statement of Facts."); [FN7] Fed. R. Civ. P. 12(b) ("If on a motion ... to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters ou tside the pleading are presented and not excluded by the court, the motion shall be treated as one for summary judgment."); *Johnson v. United States,* 2003 WL 22989550, at *1 (N.D.Ga. Oct.8, 2003) (" In support of its motion, defendant presented, and the court considered, two declarations from IRS employees as well as copies of the claims register and docket sheet from [plaintiffs' bankruptcy proceeding]. Therefore, the court will consider defendant's motion as one for summary judgment."). However, there is no affidavit supplied to support many of Defendant's factual contentions, *see* Fed. R. Civ. P. 56(e), and Defendant did not submit a Local Rule 7.1 Statement of Material Facts as required by Local Rule 7.1(a)(3).

FN7. In point of fact, paragraph 6 on page 3 of the IRS' Memorandum of Law states:
There is no indication in any document contained in the administrative files provided to the undersigned attorney by the IRS that Ms. Hudson provided the Appeals Officer with any completed Form 433-A, Collection Information Statement for Individuals, which would assist the Internal Revenue Service in making a determination as to whether collection alternatives were possible, nor is there any indication that, other than an Offer in Compromise which she later withdrew, Ms. Hudson wished to have consideration given to collection alternatives.
Def. Mem. Law. p, 3.

*4 The absence of a Local Rule 7.1 Statement of Material Facts is fatal to any motion asking the Court to grant summary judgment. *See* N.D.N.Y.L.R. 7.1(a)(3) (*"Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion."*) (underscoring in original, bold emphasis added); *Meaney v. CHS Acquisitions Corp.,* 103 F.Supp.2d 104, 111 (N.D.N.Y.2000); *Grassi v. Lockheed Martin Fed. Sys., Inc.,* 186 F.R.D. 277, 278-79 (N.D.N.Y.1999). This rule is especially important in this case because Defendant sought leave of Court some five months after the return date of the motion to correct what now appears to be a factual misstatement in its original submissions.[FN8] *See Meaney,* 103 F.Supp.2d at 108-09.[FN9]

FN8. While the Court has no doubt that Counsel asserted in good faith his position and the factual basis upon which it is based, on March 10, 2004 the IRS filed a " Supplemental Memorandum of Law" and a Supplemental Attorney Declaration. These provide, *inter alia,* that "[s]ubsequent to filing the United States' Motion, the [Government's] attorney received ... all original documents contained in the administrative files generated in connection with Eleanor Hudson's December 18, 2001 request." Def. Suppl. Mem. of Law, p. 2. Apparently, the first submissions were based upon an incomplete record despite the original representations by defense counsel that could have been construed to the contrary. *See* Cirenza July 15, 2003 Decl., ¶ 1 ("I have in my possession the Department of Justice files for this action as well as Internal Revenue Service administrative files...."). Once the *complete* record was received and reviewed, defense counsel apparently deemed it appropriate to submit the "*Supplemental* Memorandum of Law to correct a statement made in the initial motion and to reassert its first defense." Suppl. Mem. Law, p. 3 (emphasis in original). The "First Defense" had been withdrawn in the Defendant's Memorandum of Law because defense counsel believed, at that time, that " plaintiff did not have the opportunity to dispute the tax liabilities prior to the subject collection due process hearing." Def. Mem. L, p. 6 (dkt.# 13). In the supplemental submissions, he contends that she did have this opportunity.
It should also be noted that in support of the Supplemental Memorandum of Law and Attorney Declaration, Defendant submits the "Declaration of Internal Revenue Service Appeals Officer Samuel Fish." The Court is confounded as to why Defendant submitted this declaration from this IRS agent. Defendant asserts in its Supplemental Memorandum of Law that the instant action "was commenced *only* in response to the *Determination* of Revenue Officer Judith Hornstein issued on January 13, 2002." Def. Suppl. Mem. L., p. 2 (citing "Amended Declaration of Attorney Cirenza ¶ 5(c), underscoring and italics in original). The Supplemental Memorandum of Law further contends that Eleanore Hudson submitted one "Form 12153 Request" and therefore she was entitled to only one Determination by an Appeals Officer. *Id.* Yet, the Government asserts that Hudson's request was "erroneously" processed by two Appeals Officers - first, Hornstein out of the Philadelphia Office, and then Fish out of the Baltimore Office. *Id.* According to the Government, because Hornstein's review and determination took place first, Fish's determination was of no legal significance. *Id.* at 2 & n. 1. Nevertheless, Defendant seemingly relies on Appeals Officer Fish's Determination to bolster the conclusions made by Appeals Officer Hornstein. *See id.* at p. 4. However, while Defendant attaches Fish's Determination to his Declaration, it does not see fit to attach Hornstein's Determination or to admit that Plaintiff has attached a complete and accurate copy thereof. Further, as pointed out by Plaintiff's Counsel in his March 22, 2004 supplemental submissions, Fish's Determination was rendered after this a case was commenced and after Plaintiff passed away. Thus, its utility and admissibility are, at most, questionable.

FN9. As Judge Kahn stated in *Meaney:*
Our District's requirements are not empty formalities. Such rules "serve to notify the parties of the factual support for their opponent's arguments, but more importantly inform the court of the evidence and arguments in an organized way-thus facilitating its judgment of the necessity for trial." *Little v. Cox's*

> *Supermarkets,* 71 F.3d 637, 641 (7th Cir.1995). Each of these functions is vital. When a party fails to comply with these provisions it is unfair to its adversary, which has a right to know the factual bases of its opponent's case and the specific foundations for those assertions of fact; and its conduct is adverse to the conservation of judicial resources, which are most efficiently deployed when the parties fulfill their adversarial functions in a rigorously organized, coherent fashion.
> The parties must attend to the details of the Rules if the Rules are to meet those purposes. "The requirements of such rules are not onerous, but they are exacting." *Id.* The judges of our District, working with the Clerk's Office, have taken pains in revising succeeding versions of the Local Rules to provide clear, detailed guidance to parties appearing before this Court. While the Court does not wish to apply the Rules with a rigidity that would undermine the interests of justice, it is also mindful that there is a point when forbearance of a party's noncompliance with the Rules " unfairly prejudices [its] adversaries." *Blackwelder v. Safnauer,* 689 F.Supp. 106, 112 n. 2 (N.D.N.Y.1988) (Munson, C.J.).
> 103 F.Supp.2d at 108-09.

Inasmuch as Defendant has not specified the procedural mechanism in which it moves for "an order affirming the Determination of the IRS Appeals Office concerning collection action," and given the absence of competent evidence in support of many of the facts upon which the motion is based, the Court will treat the motion as one for judgment on the pleadings pursuant to Rule 12(c). All matters beyond the pleadings will be ignored. *See* II(b), *infra.*

Plaintiff's cross-motion fares no better. While Plaintiff's counsel correctly captioned the cross-motion as one for summary judgment, he too fails to present a Local Rule 7.1(a)(3) Statement of Material Facts, or competent factual evidence in support of most of the contentions made in this motion. *See* Paul S. Hudson Amend. Affirm., dkt. # 15.[FN10] Therefore, the Court will similarly treat Plaintiff's motion as a motion for judgment on the pleadings.

> FN10. There is little support for the factual contentions made by Mr. Hudson in his Supplemental Affirmation. Further, the Court is troubled by Mr. Hudson's representation of the Estate in this matter. First, it appears that Mrs. Hudson submitted an "innocent spouse" defense in the collection process, apparently asserting that the obligation was her husband's, not hers. Thus, it appears that there may be a conflict of interest between Mr. and Mrs. Hudson in this matter. Second, inasmuch as Mrs. Hudson contends in the Complaint that she did not owe any money to the IRS when it started its collection process because the agreed-upon-amount had been paid, in whole or in part, by Mr. Hudson, *see* Compl. ¶ 12, it would seem that Mr. Hudson is a material witness in this case.

B. Rule 12(c) Standard

"Judgment on the pleadings is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings." *Sellers v. M.C. Floor Crafters, Inc.,* 842 F.2d 639, 642 (2d Cir.1988). In applying Rule 12(c), the Court must utilize the same standard as that applicable to a motion under Rule 12(b)(6). *Lesbian and Gay Org. v. Giuliani,* 143 F.3d 638, 644 (2d Cir.1998); *Sheppard v. Beerman,* 18 F.3d 147, 150 (2d Cir.1994). On a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts as true all factual allegations in the complaint. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Further, "the court should construe the complaint liberally and draw inferences from the plaintiff's allegations in the light most favorable to the plaintiff." *Tomayo v. City of N.Y.,* 2004 WL 137198, at * 5 (S.D.N.Y. Jan.27, 2004) (citing *Desiderio v. National Ass'n of Sec. Dealers, Inc.,* 191 F.3d 198, 202 (2d Cir.1999)). The Court need not credit conclusory statements unsupported by assertions of facts or legal conclusions and characterizations presented as factual allegations, *see Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986), and must limit itself to facts stated in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. *See Dangler v. New York City Off Track Betting Corp.,* 193 F.3d 130, 138 (2d Cir.1999).

*5 Dismissal is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief," *Phillip v. Univ. of Rochester,* 316 F.3d 291, 293 (2d Cir.2003) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)), or where the complaint fails as a matter of law. *Phelps v. Kapnolas,* 308 F.3d 180, 187 (2d Cir.2002); *see Smith v. City of New York,* 290 F.Supp.2d 317, 319 (S.D.N.Y.2003) ("The appropriate inquiry is not whether the plaintiff might ultimately prevail on her claim, but whether she is even entitled to offer any evidence in support of the allegations in the complaint.").

IV. DISCUSSION

A. Jurisdiction

This Court has jurisdiction pursuant to 26 U.S.C. § 6330(d)(1) of the Internal Revenue Code "to review a notice of determination relating to trust fund recovery penalties; however, judicial review is limited to those issues properly raised during the collection due process hearing." *Konkel v. Comm'r of Internal Revenue,* 2000 WL 1819417, at *3 (M.D.Fla.Nov.6, 2000) (citation omitted); *Lietner v. United States,* 2004 WL 303210, at *2 (D.Kan. Jan.22, 2004). Inasmuch as Plaintiff asserts in the Complaint that: (1) after entering the Agreement which ostensibly reduced her and her husband's total tax liability for the trust fund recovery penalties and accrued interest to $30,838.49, (2) she and her husband paid more that $30,838.49 to the IRS, and (3) she brought these facts to the IRS' Appeals Officer's attention in the due process collection process, *see* Compl., Ex. B ("The taxpayer writes that she is not liable for this liability. " FN11), this matter is properly before this Court.

FN11. Drawing reasonable inferences from this statement, a fact finder could conclude that Hornstein was put on notice both that the claim had been compromised in December 1999, and that the amount set forth in the Agreement had been paid in full.

B. Standard of Review

"[W]here the validity of the underlying tax liability is properly at issue, the Court will review the matter on a *de novo* basis. However, where the validity of the underlying tax liability is not properly at issue, the Court will review the Commissioner's administrative determination for abuse of discretion. " *Sego v. Comm'r of Internal Revenue,* 114 T.C. 604, 610, 2000 WL 889754 (2000); *Lietner,* 2004 WL 303210, at *2; *Johnson,* 2003 WL 22989550, at *3; *MRCA Info. Servs. v. United States,* 145 F. SuppOn order of the Court, the application for leave to appeal the September 11, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. .2d 194, 199 (D.Conn.2000). Here, for the reasons discussed below, the validity of the underlying tax liability was properly at issue in the collection due process hearing and, therefore, review in this matter is *de novo. Lietner,* 2004 WL 303210, at *2.

C. Defendant's Motion

Defendant's motion is based on its first two defenses asserted in the Answer. Defendant asserts as its " First Defense" that Plaintiff's claim in this Court is barred because Plaintiff's tax liability arose in 1990 and therefore she was barred from challenging that liability in the 2001 collection action. Ans., p. 1. This defense, on this record, is without merit.

"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice of demand, it shall be lawful for the [IRS] to collect such tax ... by levy." 26 U.S.C. § 6331(a). Before a levy can be assessed, the IRS must notify the taxpayer of his or her right to a hearing. *Johnson,* 2003 WL 22989550, at *3 (citing 26 U.S.C. § 6330(a)). At the hearing, the taxpayer may raise " any relevant issue relating to the unpaid tax or the proposed levy, including appropriate spousal defenses; challenges to the appropriateness of the collection actions; and offers of collection alternatives." 26 U.S.C. § 6330(c)(2). The taxpayer may challenge the "existence or amount of the underlying tax liability" only if the taxpayer "did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B). "An issue may not be raised at the hearing if the issue was raised ... in any other previous administrative or judicial proceeding; and the person seeking to raise the issue participated meaningfully in such hearing or proceeding." 26 U.S.C. § 6330(c)(4)(A)-(B).

*6 In the instant case, while the trust fund recovery penalty was initially assessed against Plaintiff in 1990, any liability arising therefrom (including interest that might have accrued up to that point) was compromised by the IRS in December of 1999 when the Agreement was entered in the context of *In re: Kent & Haroldsen, Debtor,* Case No. 95-10607 (Bank.N.D.N.Y.). Further, assuming *arguendo* that Plaintiff and her husband thereafter paid the IRS more than the agreed upon amount, any effort by the IRS to collect $58,433 by levy constitutes the attempt to collect on a new tax obligation. Thus, accepting the allegations in the Complaint as true, Plaintiff "did not otherwise have an opportunity to dispute such tax liability" before the collection hearing. 26 U.S.C. § 6330(c)(2)(B). Accordingly, Plaintiff had every right to assert that she "was not liable for this liability" during the collection hearing process, *see* Notice of Determination, Compl. Ex. B, and, therefore, Defendant's motion based on its "First Defense" is denied.

In its "Second Defense," Defendant asserts that the determination by the Appeals Officer in the collection due process hearing did not constitute an abuse of discretion and therefore should be affirmed. The Court disagrees. As stated above, the standard is for *de novo* review, not abuse of discretion. Further, assuming *arguendo* that the Court applied the more deferential abuse of discretion standard, and assuming further that Appeals Officer Hornstein was advised that the IRS compromised its claim and that the compromised amount was satisfied, the summary dismissal of Plaintiff's contention that she "was not liable for this liability" would constitute an abuse of discretion. *See Anthony v. United States,* 987 F.2d 670, 674 (10 th Cir.1993).FN12 Consequently, Defendant's motion on this "Second Defense" is denied.

FN12. In *Anthony,* the IRS entered in a stipulation with taxpayers that provided that "[i]t is further stipulated that this agreement constitutes a final civil settlement of taxes due for the years in issue." 987 F.2d at 672. After entering this agreement, the IRS then asserted that it had the right to collect interest from the taxpayers in addition to the agreed upon amount in the stipulation because, in the IRS' opinion, the stipulation did not include interest and penalties. In rejecting this argument, the Tenth Circuit wrote:

Although a taxpayer is not entitled to a settlement of tax liability as a matter of right, *Kennedy v. United States,* 965 F.2d 413, 418 (7th Cir.1992), where the government enters into an agreement with its citizens, it has a duty to act with at least a "minimum standard of decency, honor, and reliability...." *Heckler v. Community Health Serv.,* 467 U.S. 51, 61, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984).

987 F.2d at 674.

D. Plaintiff's Cross-Motion

Turning to Plaintiff's cross-motion, the main thrust of the motion is not susceptible to resolution on a Rule 12(c) motion. Whether, and to what extent, Plaintiff and her husband paid the IRS monies toward the settlement after January 2, 2000 is a factual issue that cannot be resolved on the pleadings. Therefore, to the extent that the cross-motion can be read as seeking complete relief on the pleadings, the motion is denied. However, the Court will address the threshold issue presented in this case - that is, whether the Agreement bars Defendant from collecting "accrued interest on the Trust Fund Recovery Tax Penalty from the date of assessment." Ans. ¶ 8.

Defendant admits that the IRS entered the Agreement, although it does not agree with Plaintiff's interpretation of the Agreement. Ans. ¶¶ 7-8. Essentially, Defendant contends that the Agreement represents a settlement of the amount of the penalties, but that the Agreement's silence on the issue of interest should be construed as the lack of any agreement on this issue and, therefore, accrued interest remained payable even after the Agreement was entered. Plaintiff argues that the Agreement determined her obligation for penalties and interest. This dispute, in this case, is an issue of law that can be determined on the pleadings. *See Anthony v. United States,* 987 F.2d 670, 673 (10th Cir.1993) ("A settlement document is a contract and is construed using ordinary principles of contract interpretation.") (citing *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 235-38, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975)); *Hurt v.. United States,* 70 F.3d 1261, 1995 WL 703540, at *3 (4th Cir. Nov.30, 1995) (Table) ("If the meaning of a contract is unambiguous, then the intent of the parties is a question of law solely for the court and should be determined only by looking within the four corners of the document."); *Midwest Fin'l Acceptance Corp. v. FDIC,* 93 F.Supp.2d 327, 330 (W.D.N.Y.2000) ("When a case involves the interpretation of a contract and the contract is unambiguous, summary judgment is appropriate.") (citation omitted). [FN13]

FN13. As this case arises directly under federal law and is not a diversity action, the Court applies federal common law to interpret the contract. *King v. United States,* 301 F.3d 1270, 1275-77 (10th Cir.2002), *cert. denied,* 539 U.S. 926, 123 S.Ct. 2572, 156 L.Ed.2d 602 (2003). However, cases relying on state contract law are cited for generally accepted contract principles. *See Rodriguez-Abreu v. Chase Manhattan Bank, N.A.,* 986 F.2d 580, 584 (1st Cir.1993) ("Because state law provides the richest source of law of contract interpretation, we have incorporated state law principles in the process of developing a body of federal common law.").

*7 "The interpretation of waivers and agreements between taxpayers and the IRS must be in accordance with general principles of contract law." *Toker v. United States,* 982 F.Supp. 197, 202 (S.D.N.Y.1997) (citing *Goldman v. Comm'r of Internal Revenue,* 39 F.3d 402, 405 (2d Cir.1994)); *see Buesing v. United States,* 47 Fed. Cl. 621, 630 (Fed.Ct.Cl.2000) (same); *Hurt,* 1995 WL 703540, at *3 (same); *Anthony,* 987 F.2d at 673 (same). In interpreting contracts, the Court is guided by " common-sense canons of contract interpretation," including the canon that unambiguous terms are given their plain and natural meaning. *Smart v. Gillette Co. Long-Term Disability Plan,* 70 F.3d 173, 178 (1st Cir.1995). A contract should be construed to give meaning to every word or phrase contained in it. *United States v. Brye,* 146 F.3d 1207, 1211 (10th Cir.1998). If the terms of the contract are not ambiguous, the Court determines the parties' intent from the language of the agreement itself. *Goldman,* 39 F.3d at 406; *Anthony,* 987 F.2d at 673 (same).

Whether a written contract is ambiguous is a question of law for the court. *Duse v. IBM,* 252 F.3d 151, 158 (2d Cir.2001). As Defendant correctly argues, a contract is ambiguous if it is capable of more than one reasonable interpretation. *United States v. Gebbie,* 294 F.3d 540, 551 (3rd Cir.2002); *Kennewick Irrig. Dist. v. United States,* 880 F.2d 1018, 1032 (9th Cir.1989). On the contrary, a contract is unambiguous if the language contained in it "can be given a definite or certain meaning as a matter of law." *Midwest Fin'l Acceptance Corp.,* 93 F.Supp.2d at 330.

Here, there is nothing ambiguous about the terms of the Agreement as it relates to the Hudsons. In the simplest terms, the Agreement provides that "[t]he total liability of Eleanor and Paul Hudson shall be the trust fund portion." Compl. Ex. A. The Oxford

English Dictionary, 2d ed. (1989) defines the adjective "total" to mean: "(1) of, pertaining, or relating to the whole of something; (2) constituting or comprising a whole; whole, entire; or (3) complete in extent or degree; absolute, utter." The same dictionary defines "liability" to mean: "(1) The condition of being liable or answerable by law or equity; (2) The condition of being liable or subject to something, apt or likely to do something; (3) That for which one is liable ..., the debts or pecuniary obligations of a person or company." *Id.* Thus, giving these words their plain meaning, it is clear that the Agreement limits the Hudsons' pecuniary obligations to the IRS in December 1999 for penalties and interest from the trust fund penalties assessed for tax years 1989 and 1990 to " the trust fund portion."

The sentence that precedes the "total liability" sentence states: "The total Trust Fund portion of said tax will be $30,838.49." Accordingly, the unambiguous terms of the Agreement limit the Hudsons' entire obligation to the IRS for penalties and interest from the trust fund penalties assessed for tax years 1989 and 1990, as of the date of the agreement, to $30,838.49.

***8** Unlike settlement agreements with the IRS that use the term "taxes" (and which are open to varying interpretations as to whether the word "taxes" includes interests and penalties, *see Tolve v. Comm'r Internal Revenue,* 31 Fed. Appx. 73, 2002 WL 449278, at * 3 (3rd Cir. March 22, 2002) (Table) (citing cases); *Anthony,* 987 F.2d at 672 [FN14]), here the parties used a more encompassing term that, by its plain meaning, includes both the penalty and any accrued interest. *See Hurt,* 1995 WL 703540, at *3-4.[FN15] It must be assumed that when the Agreement was entered into, interests had already accrued on the trust fund penalties and, therefore, the parties' agreement as to Plaintiff's " total liability" on this date must be deemed to include the trust fund penalties and accrued interest. Because there is no ambiguity in the terms of the Agreement, the Court finds no reason to resort to extrinsic evidence to ascertain the meaning of the terms used (or not used) in the Agreement. *Goldman,* 39 F.3d at 406; *see Greco v. Department of the Army,* 852 F.2d 558, 560 (Fed.Cir.1988) (" Only if there is ambiguity should parole evidence be considered"); *Toker,* 982 F.Supp. at 202 (" According to [ ] general [contract] principles, ' [p]arole evidence may be admitted to explain a writing only when the terms of the writing are ambiguous." ') (quoting *Investors Ins. Co. of America v. Dorinco Reinsurance,* 917 F.2d 100, 104 (2d Cir.1990)).

FN14. In *Anthony,* the Tenth Circuit Court of Appeals was called on to determine the meaning of the word "taxes" in a settlement agreement between the IRS and the taxpayer. 987 F.2d at 67; *see* fn. 12, *supra.* The IRS argued that the word "taxes " did not include interest. The Tenth Circuit found that the meaning of "taxes" was ambiguous in the agreement, and looked instead to the intent of the parties in entering the agreement. *Id.* at 673. The Court ultimately rejected the IRS's argument that it had not settled the claim for interest and that the "taxpayers should have been aware of the additional interest." *Id.* at 673-74.

FN15. *Hurt* involved an income tax dispute between the Hurts and the IRS. After the parties entered a Settlement Agreement and a Stipulated Decision in the Tax Court (settling the total amount of the Hurts' liability for $30,761.93), the IRS sought to collect an additional $17,241.19 in statutory interest pursuant to 26 U.S.C. § 6601(a). *Hurt,* 1995 WL 703540, at * 1. Neither the Settlement Agreement nor the Stipulated Decision specifically addressed statutory interest. *Id.* The Hurts paid the statutory interest under protest and filed a refund suit in district court. *Id.* Concluding that the settlement agreements contractually precluded the government from collecting the $17,241.19 in statutory interest, the district court granted summary judgment in favor of the Hurts. The Fourth Circuit Court of Appeals affirmed, stating:
In our view, the language employed in the first sentence of the Settlement Agreement

> and the first sentence of the Stipulated Decision plainly evidences the IRS's intent to waive the Hurts' liability for statutory interest by entering into these agreements.... *Critically, neither agreement excepted the issue of the Hurts' liability for statutory interest from its all encompassing language. Because neither agreement provided that the Hurts would be liable for statutory interest on the settled income tax deficiency and penalties for the 1986 tax year, we conclude the government waived its right to subsequently collect this interest.*
> *Id.* at * 3 (emphasis added).

It is also important that the Agreement was entered into by attorneys representing all parties to the contract. Certainly, had there been an intention to exclude accrued interest from the Hudson's "total liability," a provision to this extent should have been specifically included in the Agreement. *Hurt,* 1995 WL 703540, at *3. The absence of such an exclusionary clause in the part of the Agreement pertaining to the Hudsons, especially in light of the fact that such an exclusionary clause is present in other portions of the Agreement, *see* Compl, Ex. A, p. 2 ("$24,815.11-Total 941 Employment Tax due from Kent & Haroldsen for 1990, *not counting penalty or interest."*) (emphasis added), indicates that it was intentionally left out with regard to the Hudsons. *See In re Ore Cargo, Inc.,* 544 F.2d 80, 82 (2d Cir.1976) ("While the contract also granted the bank certain rights not conferred by the U.C.C., notably a right of set-off, this factor is of little aid to the Bank. Applying the maxim, *expressio unius est exclusio alterius,* the failure of Israel Discount, a sophisticated commercial lender, to include a similar specific reference to tort claims precludes our divining or implying such a right on the basis of the general language of the agreement."); *U.S. v. Local 6A, Cement and Concrete Workers, Laborers Intern. Union of North America,* 832 F.Supp. 674, (S.D.N.Y.1993) ("The doctrine of *expressio unius est exclusio alterius* is available as one tool for seeking to ascertain the intention of drafters of documents or the probable interpretation of readers.. ..").

*9 Further, while Defendant may be correct that this Court lacks the authority to relieve Plaintiff of an interest assessment, *see* Def. Suppl. Mem. L., p. 7 (citing *Carlson v. United States,* 126 F.3d 915, 920 (7th Cir.1997)), in this case it was the IRS that relieved Plaintiff of her interest obligation, not this Court. The IRS has always been empowered with the discretion to grant an abatement of interest. *See Carlson,* 126 F.3d at 920 (holding that under § 6404(e)(1), an abatement of interest is within the sole authority of the Secretary of the Treasury); *Speers v. United States,* 38 Fed. Cl. 197, 202 (Fed.Ct.Cl.1997) (holding that the IRS' decision whether to abate interest on employment taxes is solely within the agency's discretion and is therefore nonjusticiable); *Brahms v. United States,* 18 Cl.Ct. 471, 475-76 (Fed.Ct.Cl.1989) (holding that § 6404(e)(1) does not permit judicial review because the IRS' decision to abate interest is purely discretionary). This Court is asked only to interpret the contract between the parties. Simply because this Court determines that the clear and unambiguous terms of the Agreement demonstrate the parties' agreement to abate statutory interest (thus signifying that the IRS exercised this discretion) does not mean that the Court has somehow overridden the IRS' authority. *See Miller v. Comm. of Internal Revenue,* 310 F.3d 640, 642 (9th Cir.2002) ("In 1996, however, Congress amended the statute, adding what is now § 6404(h), granting the tax court jurisdiction to determine whether the Secretary's failure to abate interest constituted an abuse of discretion.").

Finally, there is no merit to Defendant's contention that any waiver of interest in the agreement is void because A.U.S.A. Cagino had not been given authority to waive accrued interest. The relevant question is whether she had the authority "to bind the United States in contract," not whether she was specifically authorized to enter certain terms of an agreement. *Total Med. Management, Inc. v.. United States,* 104 F.3d 1314, 1319 (Fed.Cir.1997), *cert. denied,* 522 U.S. 857, 118 S.Ct. 156, 139 L.Ed.2d 101 (1997). Because there is no dispute that the Government's attorney had authority to bind the Government in contact, the entire agreement is enforceable.

Thus, given the clear and unambiguous terms of the Agreement, the Court finds that the parties agreed to limit Plaintiff's total liability to the IRS on January 3, 2000 for the trust fund penalties and any accrued interest to $30,838.49. Based upon the present record, however, questions of fact exist as to whether, and in what amount, Plaintiff and/or her husband satisfied this $30,838.49 obligation. Further, because the issue has not been squarely raised and addressed by the parties, the Court expresses no opinion as to whether Defendant can collect interest that may have accrued on the $30,838.49 after January 3, 2000. Accordingly, Plaintiff's motion is granted in part and denied in part.

V. CONCLUSION

***10** Based upon the above, Defendant's motion [dkt # 12-1] is denied. Plaintiff's cross-motion [dkt. # 14-1] is granted in part and denied in part. The motion is granted inasmuch as the Court finds and concludes that, pursuant to the terms of the Stipulation of Settlement Agreement attached as Exhibit A to the Complaint, Plaintiff ELEANOR HUDSON's total liability to Defendant INTERNAL REVENUE SERVICE as of January 2, 2000 for the trust fund penalties assessed for tax years 1989 and 1990, and for any interest on those penalties that accrued up to January 2, 2000, is $30,838.49. The motion is denied in all other respects. Both parties are granted leave to file a properly supported motion for summary judgment following the conclusion of discovery.

The matter is referred to Magistrate Judge Treece to determine whether Paul S. Hudson, Esq. should be disqualified from representing Plaintiff in this matter. *See* fn. 10, *supra*.

IT IS SO ORDERED

N.D.N.Y.,2004.
Hudson v. I.R.S.
Not Reported in F.Supp.2d, 2004 WL 1006266 (N.D.N.Y.), 93 A.F.T.R.2d 2004-1830

Briefs and Other Related Documents (Back to top)

• 2003 WL 24152713 (Trial Pleading) Complaint (Feb. 10, 2003)
• 1:03CV00172 (Docket) (Feb. 10, 2003)

END OF DOCUMENT

Westlaw.

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Briefs and Other Related Documents

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

SUZHOU TEXTILES IMPORT & EXPORT CORP., Plaintiff,

v.

SWELL FASHIONS, INC., Defendant.

No. 96 Civ. 1386 (BSJ).

Oct. 11, 1996.

Memorandum and Order

JONES, District Judge:

*1 Plaintiff moves for summary judgment on its fifth cause of action which seeks $38,016 as payment for silk track suits (the "merchandise") shipped to defendant on January 27, 1995, as the first shipment pursuant to a written contract for $396,000.

In support of its motion for summary judgment, plaintiff submitted an affidavit by Jing Zhang Yu, plaintiff's Deputy General Manager. Mr. Yu stated that plaintiff delivered merchandise to defendant on January 27, 1995. Yu Decl. ¶ 6. On April 21, 1995, Mr. Yu received a check from defendant in the amount of $38,016 which was dishonored due to insufficient funds in the account. *Id.* ¶¶ 7, 8. After he notified defendant of the dishonored check, defendant apologized and requested that plaintiff redeposit the check. *Id.* ¶ 11. The check was again dishonored. *Id.* ¶ 12. Plaintiff's fifth cause of action seeks to recover the amount of the dishonored check.

Defendant opposes plaintiff's motion for summary judgment by arguing that it is not liable for payment of the $38,016 check because plaintiff's goods were of poor quality and not in condition to be sold, which defendant discovered only after sending the dishonored check to plaintiff. George Lin, owner of defendant, submitted an affidavit in which he explained that before entering the contract with plaintiff, his quality control inspector reported that plaintiff's merchandise was of very poor quality and probably not saleable to the United States. Lin.Aff. ¶ 2.

Nevertheless, according to Lin, plaintiff agreed to sell a limited amount of merchandise to defendant on the condition that plaintiff "would first inspect the merchandise item-by-item and insure that the [merchandise] were free from any flaws prior to being shipped to [defendant] in New York." *Id.* ¶ 3. The merchandise arrived in New York still sealed in plaintiff's cartons, and, according to Lin, it was only after defendant delivered the check to plaintiff that defendant's customers began returning the merchandise stating that it was defective. *Id.* ¶ ¶ 5, 6. Indeed, defendant has asserted counterclaims related to the defective condition of the merchandise.

Plaintiff tersely argues that by sending payment, defendant admitted liability for $38,016 for the first shipment and waived its defense as to the quality of the merchandise. Plaintiff's argument does not entitle it to summary judgment [FN1] on this claim.

FN1. Under Rule 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

First, although by sending a check in the amount of $38,016 defendant admitted the amount due for the first shipment, defendant did not admit its liability for that amount. Rather, defendant's claim that it is not liable for this amount because of the defective

Page 3 of 3

nature of the goods sounds in breach of contract, and thus presents a factual question as to the quality of the merchandise and the possibility of breach by plaintiff.

Second, plaintiff's argument that defendant's check constitutes a waiver of its defenses relating to the defects in the merchandise also must fail. "Waiver" is an intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. *See, e.g., Voest-Alpine Int'l Corp. v. Chase Manhattan Bank, N.A.,* 707 F.2d 680, 685 (2d Cir.1983) (citing *Werking v. Amity Estates Inc.,* 2 N.Y.2d 43, 155 N.Y.S.2d 633, 137 N.E.2d 321 (1956), *cert. denied,* 353 U.S. 933, 77 S.Ct. 812 (1957). On this record, there is a factual dispute as to whether defendant knew of the poor quality of the merchandise when he sent payment to plaintiff. If defendant was unaware of his defense, he could not legally waive it.

***2** For these reasons, plaintiff's motion is denied. Parties are directed to file a joint pretrial order on November 22, 1996. The parties shall appear for a final pretrial conference on November 25, 1996 at 10:00 a.m. Trial will commence at 10:00 a.m. on December 2, 1996.

So ordered.

S.D.N.Y.,1996.
Suzhou Textiles Import & Export Corp. v. Swell Fashions, Inc.
Not Reported in F.Supp., 1996 WL 586348 (S.D.N.Y.)

Briefs and Other Related Documents (Back to top)

- 1:96cv01386 (Docket) (Feb. 26, 1996)

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Not Reported in F.Supp.2d, 2003 WL 23018807 (S.D.N.Y.), 32 Employee Benefits Cas. 1747, 9 Wage & Hour Cas.2d (BNA) 499
(Cite as: Not Reported in F.Supp.2d)

Briefs and Other Related Documents

United States District Court,S.D. New York.
Monica KNOLL, Plaintiff,
v.
EQUINOX FITNESS CLUBS n/k/a Equinox Holdings, Inc., Equinox Wellness Center Inc., Harvey J. Spevak, and The Equinox Health and Welfare Plan, Defendants.
No. 02 Civ. 9120(SAS).

Dec. 22, 2003.

Terminated employee brought action against former employer and employee benefit plan, claiming, inter alia, violation of Americans with Disabilities Act of 1990 (ADA). Defendants moved for summary judgment. The District Court, Scheindlin, J., held that: (1) employee's waiver of claims in release agreement was valid; (2) employer's alleged breaches were not material; (3) employee was not fraudulently induced to sign agreement; (4) employee did not sign agreement under duress; (5) agreement was not repudiated; and (6) employee was not liable to employer for cost of defending action.

Motion granted.

West Headnotes

[1] Release 331 13(1)

331 Release
331I Requisites and Validity
331k11 Consideration
331k13 Sufficiency in General
331k13(1) k. In General. Most Cited Cases

Release 331 15

331 Release
331I Requisites and Validity
331k15 k. Reality of Assent in General. Most Cited Cases
Terminated employee's waiver, in release agreement, of claims relating to employment or termination, was valid; agreement did not fail for lack of clarity, despite surplusage, or lack of consideration, given that employer agreed to pay additional five months of Consolidated Omnibus Budget Reconciliation Act (COBRA) premiums, employee had sufficient time to contemplate terms, make changes, and knowingly and voluntarily agree to revised terms, attorney reviewed release, which recognized that employee could consult attorney and implicitly encouraged her to do so, and absence of express provision encouraging consultation with attorney was not improper, given that employee was educated business person. Consolidated Omnibus Budget Reconciliation Act of 1985, § 1 et seq., 100 Stat. 82.

[2] Compromise and Settlement 89 20(2)

89 Compromise and Settlement
89I In General
89k20 Performance or Breach of Agreement
89k20(2) k. Rights of Parties on Breach. Most Cited Cases
Former employer's alleged breaches of release agreement, in which it had agreed to extend health benefits in exchange for terminated employee's waiver of claims, were not material, as required for rescission; employer's first cancellation of employee's health insurance was quickly rectified, and employer's second alleged cancellation of her insurance did not result in any lapse in her coverage.

[3] Release 331 17(.5)

331 Release
331I Requisites and Validity
331k17 Fraud and Misrepresentation

331k17(.5) k. In General. Most Cited Cases
Former employer's alleged failure to notify terminated employee of her Consolidated Omnibus Budget Reconciliation Act (COBRA) rights did not constitute fraudulent inducement of employee to sign release agreement, in which employee agreed to waive claims related to employment and termination in exchange for employer's agreement to pay five additional months of COBRA premiums; employer did not have duty to disclose COBRA information on date release was signed, which was within forty-four days of employee's termination. Employee Retirement Income Security Act of 1974, § 606, 29 U.S.C.A. § 1166; Consolidated Omnibus Budget Reconciliation Act of 1985, § 1 et seq., 100 Stat. 82.

[4] Release 331 ⚿18

331 Release
331I Requisites and Validity
331k18 k. Duress. Most Cited Cases
Release agreement, in which terminated employee agreed to waive claims relating to employment and termination in exchange for employer's agreement to extend health benefits, was not signed by employee under economic duress, absent evidence of wrongful threat by employer; although employer may have been aware of employee's financial circumstances at time of her termination, there was no evidence that it used this information as leverage during release negotiations.

[5] Release 331 ⚿21

331 Release
331I Requisites and Validity
331k21 k. Ratification. Most Cited Cases
Release agreement, in which terminated employee agreed to waive claims relating to employment and termination in exchange for former employer's agreement to extend health benefits, was not repudiated by employee when she filed discrimination charge with Equal Employment Opportunity Commission (EEOC), or by employer when it purportedly took a credit for premiums paid on employee's insurance; rather, it had been previously ratified when employee agreed to extension of coverage and accepted employer's reinstatement of coverage after insurance had been erroneously cancelled.

[6] Compromise and Settlement 89 ⚿21

89 Compromise and Settlement
89I In General
89k21 k. Enforcement. Most Cited Cases
Terminated employee, who signed release agreement in which she agreed to waive claims related to employment and termination in exchange for former employer's agreement to extend health benefits, was not liable for cost to employer of defending discrimination action she initiated; employer did not expressly state intention to impose damages if release were breached, and employee had reasonable, good faith basis in arguing that release was invalid and/or unenforceable.

Nina H. Kazazian, Denver, Colorado, for Plaintiff.
Christina L. Feege, Littler Mendelson, P.C., New York, New York, for Defendants.

OPINION AND ORDER

SCHEINDLIN, J.
*1 Plaintiff has sued Equinox Fitness Clubs n/k/a Equinox Holdings, Inc. and Equinox Wellness Center Inc. (collectively "Equinox"), Harvey J. Spevak, Chief Executive Officer of Equinox, and the Equinox Health and Welfare Plan (the "Plan") pursuant to the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, the New York Executive Law §§ 290 *et seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 *et seq.* Plaintiff also claims that defendants violated the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.*, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and state and federal common law. Defendants have moved to dismiss the Complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the following reasons, defendants' motion is granted and this action is dismissed.

I. FACTS [FN1]

FN1. The facts are primarily taken from the admitted portions of defendants' amended Rule 56.1 Statement of Undisputed Facts ("Def. R. 56.1"). Where defendants have not addressed a particular fact in their Rule 56.1 Statement and where plaintiff has denied the facts contained therein, reference is made to the underlying source documents, *e.g.*, deposition transcripts, affidavits.

Knoll, a college graduate with previous business experience, began working for Equinox as a marketing manager on April 24, 2000. *See* Def. R. 56.1 ¶¶ 1-3. In October of 2000, Knoll was diagnosed with breast cancer. *See id.* ¶ 9. Knoll underwent surgery shortly thereafter and then began receiving chemotherapy treatments in December of 2000, which continued through May 2001. *See* Deposition of Monica Knoll ("Knoll Dep.") at 116-17. Knoll originally scheduled reconstructive surgery for September 11, 2001, but due to the tragic events of that day, her surgery was rescheduled and took place on November 6, 2001. *See id.* at 42; *see also* Def. R. 56.1 ¶ 50.

Knoll was terminated on October 1, 2001. *See* Def. R. 56.1 ¶ 25. At Knoll's termination meeting were Kathy Reilly, her manager, and Ellen Lory, Equinox's Human Resources Manager. *See* Knoll Dep. at 38. At that meeting, there were no discussions concerning the possibility of extending plaintiff's health insurance coverage or of her executing a general release. *See* Def. R. 56.1 ¶¶ 28-29. Within approximately ten days after her discharge, Knoll discussed extending her health benefits with Reilly and specifically sent Reilly an e-mail asking for information concerning her rights under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), to which she did not receive a response. *See* Knoll Dep. at 146-47.

Some time after her discharge, defendants forwarded to Knoll a Separation Agreement and General Release ("Release") which released Equinox from "any and all causes of action, claims or demands relating to her employment with [Equinox] or the termination thereof...." Release ¶ 1 (acknowledgment section). [FN2] In exchange, Equinox agreed, among other things, "to pay the first six (6) months of COBRA starting as of Nov. 1, 2001...." *Id.* ¶ 2 (consideration section). The Release further states: "By signing below, the Employee indicates that she has carefully read and understood the terms of this Agreement, enter[s] into this Agreement knowingly, voluntarily and of [her] own free will, understands its terms and significance and intend[s] to abide by its provisions without exception." *Id.*

FN2. The full text of the provision follows:
Employee releases and forever discharges the Company from any and all causes of action, claims or demands relating to her employment with the Company or the termination thereof, including but not limited to those in tort for wrongful or retaliatory discharge in violation of public policy or defamation; in contract, whether express or implied; under any Company policy, procedure or benefit plan; or any federal, state or local law, including but not limited to Title VII or the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act and the New York Law Against Discrimination.
Release ¶ 1 (acknowledgment section).

***2** Knoll executed the Release on November 1, 2001. *See id.* Knoll testified that she received a draft version of the Release from Lory by e-mail, but she could not recall the date. *See* Knoll Dep. at 149. Knoll further testified that she had her stepfather, an attorney, "take a look at it." *See id.* at 150. Her stepfather did not express any concerns over the Release. *See id.* at 150-51. Knoll did not immediately execute the draft Release as there were some items that she and Lory "had to go back and forth on that weren't written clearly enough." *Id.* at 151. Knoll admitted that Lory subsequently e-mailed her another draft version of the Release. *See id.* at 152. When asked how long she waited before signing the final Release after first receiving the draft version, Knoll stated:

I know there was an e-mail to Kathy-I had sent to Kathy dated October and I think I sent her in mid October saying that, at that time, I still hadn't received anything on the COBRA. So it had to have been after the 12th [of October 2001], and I just, you know, I just know that there was some back and forth on the corrections, but we got closer and closer to the date of November 1....

Id. at 152-53.

Plaintiff first noticed a problem with her health insurance in February of 2002, when she went to pick up a prescription and was told by the pharmacist that her insurance had lapsed. *See* Def. R. 56.1 ¶ 51; Knoll Dep. at 164. She subsequently received a letter from Equinox's health insurance carrier, The Guardian Life Insurance Company of America ("The Guardian") informing her that her coverage is cancelled as of October 31, 2001. *See* 2/13/02 Letter from Health Net, Ex. 3 to the Declaration of Monica Knoll Pursuant to 28 U.S.C. § 1746 ("Knoll Decl.").

On February 18, 2002, Knoll e-mailed Bill Welsh, the person responsible for employee benefits at the time, and informed him that her insurance had been cancelled. *See* Def. R. 56. ¶ 52. In her e-mail message, Knoll indicated that she was supposed to have continuing coverage under COBRA, which should have gone into effect on November 1, 2001. *See* Affidavit of William J. Welsh ("Welsh Aff."), Equinox's Controller ¶ 3. Welsh knew that plaintiff had been terminated several months earlier but was unaware of any agreement extending her health benefits. *See id.* When he saw Knoll's name listed as an active employee for insurance purposes, he instructed Lorna Montano, Equinox's Benefits Administrator, to remove her from the insurance plan. *See* Def. R. 56.1 ¶¶ 57-58. As a result of this cancellation, Knoll incurred $100 in out-of-pocket costs. *See* Knoll Dep. at 186.

Welsh subsequently investigated the problem and learned that Knoll was entitled to health benefits under the Release. *See* Def. R. 56.1 ¶ 61. Plaintiff was mailed a COBRA election form to continue coverage, which she completed and signed on March 1, 2002. *See id.* ¶¶ 62-63; *see also* Election of Continued Coverage form, Ex. C to the Welsh Aff.[FN3] Montano sent this completed form to The Guardian, along with a letter requesting that Knoll's coverage be reinstated. *See* Def. R. 56.1 ¶ 64; *see also* 3/1/02 Letter from Montano, Ex. B to the Welsh Aff. (stating that Knoll "was never informed nor did she become active with COBRA"). On March 15, 2002, The Guardian sent Montano a notice informing her that Knoll was covered as of November 1, 2001. *See* Facsimile Transmission from The Guardian dated March 15, 2002, Ex. D to the Welsh Aff. Knoll acknowledged that her insurance had been retroactively reinstated. *See* Knoll Dep. at 186.

FN3. Although the copy submitted to the Court is indecipherable, the form contains six single-spaced paragraphs which presumably explain an employee's COBRA rights.

II. LEGAL STANDARD

*3 Summary judgment is permissible "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). " An issue of fact is genuine 'if the evidence is such that a jury could return a verdict for the nonmoving party." ' *Gayle v. Gonyea,* 313 F.3d 677, 682 (2d Cir.2002) (quoting *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A fact is material when "it 'might affect the outcome of the suit under the governing law." ' *Id.* (quoting *Anderson,* 477 U.S. at 248).

The party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. *See Marvel Characters, Inc. v. Simon,* 310 F.3d 280, 286 (2d Cir.2002) (citing

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). In turn, to defeat a motion for summary judgment, the non-moving party must raise a genuine issue of material fact. To do so, he " 'must do more than simply show that there is some metaphysical doubt as to the material facts," ' *Caldarola v. Calabrese,* 298 F.3d 156, 160 (2d Cir.2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)), and he " 'may not rely on conclusory allegations or unsubstantiated speculation." ' *Fujitsu Ltd. v. Federal Express Corp.,* 247 F.3d 423, 428 (2d Cir.2001) (quoting *Scotto v. Almenas,* 143 F.3d 105, 114 (2d Cir.1998)). *See also Gayle,* 313 F.3d at 682. Rather, the non-moving party must produce admissible evidence that supports his pleadings. *See First Nat'l Bank of Arizona v. Cities Serv. Co.,* 391 U.S. 253, 289-90, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). In this regard, "[t]he 'mere existence of a scintilla of evidence' supporting the non-movant's case is also insufficient to defeat summary judgment." *Niagara Mohawk Power Corp. v. Jones Chem., Inc.,* 315 F.3d 171, 175 (2d Cir.2003) (quoting *Anderson,* 477 U.S. at 252).

In determining whether a genuine issue of material facts exists, the court must construe the evidence in the light most favorable to the non-moving party and draw all inferences in that party's favor. *See id.* at 171. Accordingly, the court's task is not to " weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249. Summary judgment is therefore inappropriate "if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party." *Marvel,* 310 F.3d at 286 (citing *Pinto v. Allstate Ins. Co.,* 221 F.3d 394, 398 (2d Cir.2000)).

III. DISCUSSION

A. Validity of the Release

"Employees may waive employment discrimination claims as long as such a waiver is made knowingly and voluntarily." *Benson v. NYNEX, Inc.,* No. 97 Civ. 2168, 2001 WL 579786, at *2 (S.D.N.Y. May 29, 2001), *aff'd,* 2002 WL 722683 (2d Cir. Apr.24, 2002). In evaluating such waivers, the Second Circuit has adopted a "totality of the circumstances" standard which recommends that the following factors be considered:

***4** (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the agreement prior to signing it; (3) the role of plaintiff in deciding the terms of the agreement; (4) the clarity of the agreement; (5) whether plaintiff was represented by or consulted with an attorney; (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which plaintiff was already entitled to under contract or law; (7) whether the employer encouraged plaintiff to consult an attorney; and (8) whether the employee had a fair opportunity to do so.

Bormann v. AT & T Communications, Inc., 875 F.2d 399, 403 (2d Cir.1989). "This list of factors is not exhaustive, nor must all factors be satisfied to enforce the waiver." *Benson,* 2001 WL 579786, at *2.

1. Adequacy of Consideration/Clarity

Plaintiff argues that the Release is unclear as to the consideration given in exchange for the waiver. For example, paragraph one states that "Employee shall not be considered an employee of the company after September 28, 2001" while the third paragraph states that Knoll "shall be reimbursed for all reasonable business expenses" even though she was entitled to such reimbursement without signing the Release. Release ¶¶ 1, 3 (consideration section). With regard to the payment of six months of COBRA premiums, plaintiff contends that she was already entitled to receive one month of COBRA coverage under the terms of her employment agreement. *See* Terms and Conditions of Employment Letter ¶ 4, Ex. 1 to the Knoll Decl. Spevak disputes this, stating that the one-month COBRA provision was never meant "to address the payment of insurance premiums upon the termination of Ms. Knoll's employment." Affidavit of Harvey S. Spevak ¶ 1. Accepting plaintiff's understanding of this provision for purposes of this motion, the only consideration she received in exchange for the waiver was an additional five months of health insurance.

[1] Although the Release is not a model of clarity, the first and third paragraphs are merely surplusage. It is indisputable that Equinox agreed to pay six months of COBRA premiums. Deducting the one-month of COBRA plaintiff claims she was already entitled still leaves five months of paid medical coverage. Plaintiff was not otherwise entitled to five months of COBRA premiums upon her termination. Although in retrospect it may not have been the best deal plaintiff could have made, the Release does not fail for either lack of clarity or consideration. *See Chaput v. Unisys Corp.,* 964 F.2d 1299, 1301 (2d Cir.1992) ("A release is not effective unless the party giving the release receives *something of value* to which the party was not otherwise entitled.") (emphasis added).

2. Timing

Plaintiff argues that there is no evidence that shows she received and reviewed the Release before she signed it on November 1, 2001, and that such a short period of time for review should invalidate her waiver. This argument must also be rejected as it is belied by the evidence. Plaintiff testified that she received a draft version of the Release sometime after her termination. She also testified that she had to go "back and forth" with her suggested changes and that she received another draft version thereafter. Finally, Knoll's stepfather reviewed the Release before she signed it. All of this indicates that plaintiff had sufficient time to contemplate the terms of the Release, make changes to it, and knowingly and voluntarily agree to its revised terms.

3. Assistance of Counsel

***5** Plaintiff claims that she did not consult an attorney before signing the Release despite her admission that she asked her stepfather, an attorney, to "take a look at it." Knoll Dep. at 150. Plaintiff contends that she discussed the Release with her stepfather in his capacity as her parent, not as her attorney. *See id.* ("It was more of a stepfather, daughter conversation than a legal [conversation]."). However plaintiff characterizes this discussion, the fact remains that her stepfather is an attorney who necessarily brings his experience as an attorney to any matter he reviews. Furthermore, while the Release does not explicitly advise plaintiff to seek the advice of counsel, it does contain the following language: "The confidentiality requirement, however, shall not prohibit Employee from disclosure to her immediate family (spouse, siblings, parents), her attorney or tax agencies as required, who must also abide by this confidentiality agreement." Release ¶ 7. The Release thereby recognizes that plaintiff may consult an attorney and implicitly encourages her to do so. Because plaintiff is an educated business person, the absence of an express provision in this regard does not weigh against a finding that plaintiff signed the Release knowingly and voluntarily.

B. Enforceability of the Release

1. Material Breach

Plaintiff seeks to rescind the Release on the ground that Equinox twice breached its terms by not paying the agreed-upon premiums.FN4 The first alleged breach, which occurred in February of 2002, was quickly remedied by Welsh after Knoll alerted him to the problem. The second alleged breach occurred in March of 2002. Knoll received a second notice from Health Net, dated March 15, 2002, which indicated that her coverage had been cancelled as of October 31, 2001. *See* Ex. 4 to the Knoll Decl. There is no evidence that Knoll contacted anyone at Equinox after receiving this second notice.

FN4. Plaintiff attempt to rely on the following request for admissions which she

contends should be deemed admitted pursuant to Rule 36(a) of the Federal Rules of Civil Procedure:
1. Defendants cancelled Knoll's COBRA continuation coverage effective October 31, 2001.
2. Defendants cancelled Knoll's COBRA continuation coverage on or before March 18, 2002.
3. Knoll's COBRA coverage has been cancelled more than once since January 1, 2002 as a result of Defendants' acts or omissions.
See Plaintiff's Second Set of Combined Discovery Requests, Ex. M to the Affidavit of Nina H. Kazazian, plaintiff's attorney. According to plaintiff, defendants' responses were due April 30, 2003 but were not served until May 6, 2003. *See* 9/4/03 Letter from Nina Kazazian at 1.
Defendants oppose such admission on the ground that they agreed not to submit a motion they prepared regarding the untimeliness issue to Magistrate Judge Douglas F. Eaton in exchange for plaintiff's promise to forego reliance on such admissions in her opposition to defendants' motion for summary judgment. *See* 9/3/03 Letter from Christina L. Feege. Plaintiff is arguably in breach of this promise by including these admissions in her papers although plaintiff disputes this. *See* 9/5/03 Letters from Christina L. Feege and Nina H. Kazazian.
It is well settled that a failure to respond to a request for admissions permits a district court to enter summary judgment if the facts deemed admitted are dispositive, as they are here. *See Moosman v. Joseph P. Blitz, Inc.,* 358 F.2d 686, 688 (2d Cir.1966). However, a district court is not required to do so and may, under compelling circumstances, allow untimely responses to avoid the deemed admissions. *See id.* I find the parties' dispute concerning plaintiff's alleged agreement to refrain from relying on the admissions sufficiently serious. Accordingly, the facts contained in plaintiff's request for admissions will not be deemed admitted for purposes of this motion.

Knoll argues that Equinox had her insurance cancelled a second time when it attempted to take a credit for premiums paid on her behalf in March of 2002. A voucher dated March 18, 2002, for the check Equinox issued to The Guardian in payment of its March 1, 2002 bill, reflects an offset of $1,455.76 with the comment "Re: Monica Knoll." *See* Ex. E to the Welsh Aff. Although Welsh stated that he was not sure why that credit was taken, Jennifer Zeiber, Administrative Analyst with The Guardian, provides a credible explanation. According to Zeiber, The Guardian received a termination notice effective November 1, 2001, which was processed on February 8, 2002. *See* June 6, 2003 E-Mail from Zeiber, Ex. F to the Welsh Aff. As a result, the original March 1, 2002 bill removed Knoll from all coverages and reflected a credit in the member billing adjustment section. *See id.* The Guardian then received Knoll's COBRA continued election form on March 7, 2002, requesting that she be enrolled retroactively to November 1, 2001. *See id.* On March 14, 2002, the original March bill was revised to reflect Knoll's coverage and correct the premium charged. *See id.; see also* Affidavit of Jennifer Zeiber ("Zeiber Aff.") ¶ 2. According to Zeiber, The Guardian has "no record of Monica Knoll's insurance being cancelled on or about March 15, 2002, nor [does it] have any record that a request for cancellation was made by Equinox at or about that time." Zeiber Aff. ¶ 4.

***6** It is well-settled that where performance of a contract is underway, only non-performance that rises to the level of a "material breach" will justify rescission. *See Krumme v. WestPoint Stevens Inc.,* 238 F.3d 133, 143 (2d Cir.2000) ("Under New York law, rescission is an extraordinary remedy, appropriate only where the breach is found to be material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.") (internal quotation marks and citation omitted). A material breach occurs where the non-breaching party has been deprived of the reasonably expected benefit of the bargain in a way that cannot be compensated. *See Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.,* 111 F.3d 284, 289 (2d Cir.1997) ("A party's obligation to perform under a contract is only excused where the other party's breach of the contract is so substantial that it defeats the object of the parties in making the contract.").

[2] The first breach occurred in February of 2002 when plaintiff learned of her lack of health insurance when she attempted to fill a prescription. However, after she notified Welsh of her dilemma, the problem was quickly cured and plaintiff received the full benefit of her bargain as her coverage was retroactively reinstated to November 1, 2001. As a result of the first breach, plaintiff incurred approximately $100 in out-of-pocket costs.

The second breach occurred when Equinox allegedly cancelled plaintiff's insurance in March of 2002. Even if Equinox attempted to do so, there is no evidence of any lapse in plaintiff's health insurance coverage. If there were a true lapse in coverage, plaintiff would presumably be responsible for the costs of the reconstructive surgery she underwent in November 2001. Nowhere in her opposition papers does plaintiff indicate that anyone is seeking indemnification from her for the costs of this surgery. The only logical conclusion is that plaintiff remained covered despite any internal record-keeping problems between Equinox and The Guardian.[FN5] Accordingly, the alleged breaches, if they can in fact be considered breaches, do not rise to the level justifying rescission of the Release. Nor do they show any intent on the part of Equinox to repudiate the Release.

FN5. Plaintiff insists that the language of the Release-requiring Equinox to *pay* six months of COBRA premium, not simply provide six months of COBRA coverage to her-must be strictly construed against the defendants as drafters of the Release. However, that rule does not apply here as Knoll can be considered a co-drafter given her revisions to the earlier drafts of the Release. In any event, such a distinction would exalt form over substance.

2. Fraudulent Inducement

Plaintiff claims that defendants purposefully failed to disclose the required COBRA information to her and, as a result, she executed the Release based on the false impression that she had to do so to obtain health insurance. Although plaintiff admits that she knew she could avail herself of COBRA without signing the Release, she now argues that she was under the false impression that she only had thirty days in which to do so.[FN6]

FN6. At her deposition, which took place on March 13, 2003, plaintiff testified as follows:
A. So if I didn't have health coverage by November 1 and I had no insurance with cancer, I thought that meant that I would not be eligible for insurance based on my precondition.
Q. Did you-were you aware that you could avail yourself of COBRA without signing this, aside from the monetary issues?
A. Yes.
Knoll Dep. at 156. In an Errata Sheet dated July 11, 2003, Knoll adds at the end of the last answer "Because I did not have any COBRA information as I had requested several times, I understood ONLY that I had until 10/31 to sign up for COBRA. I didn't even know how much the monthly payments were. So when 11/1 rolled around, I believed I had no choice but to sign the document in order to have insurance.
This Court is mindful that a plaintiff cannot defeat a motion for summary judgment by recanting earlier testimony by way of errata sheets submitted long after her deposition was taken. *See Margo v. Weiss,* 213 F.3d 55, 60-61 (2d Cir.2000).

As with any other contractual release, " circumstances evincing fraudulent inducement, misrepresentation, mutual mistake, or duress would justify setting aside the release." *De Pace v. Matsushita Elec. Corp. of America,* 257 F.Supp.2d 543, 556 (E.D.N.Y.2003) (citing, as an example, *Allen v. WestPoint-Pepperell, Inc.,* 945 F.2d 40, 45 (2d Cir.1991) (denying release legal effect when based on misrepresentation of a material fact). The elements of a fraudulent inducement claim include: (1) misrepresentation of a material fact; (2) falsity of that representation; (3) scienter; (4) reliance; and (5) damages. *See Bandelli v. Allstate Ins. Co.,* No. 99 Civ. 9566, 1999 WL 787768, at *1 (S.D.N.Y. Oct.4, 1999). With regard to omissions of material fact,

*7 a plaintiff may pursue a claim for fraud if the defendant failed to disclose information, when it had a duty to disclose, which would also constitute the breach of another legal duty separate and apart from the duty to perform under the contract. As to that, it is well settled that, under New York law, omissions of material fact may rise to a level constituting fraud and serve as a basis for an action for money damages, or for rescission of a release. Before such omissions can be labeled fraudulent, however, *there must be a showing that a duty of disclosure existed.*

Frontier-Kemper Constructors, Inc. v. American Rock Salt Co., 224 F.Supp.2d 520, 529-30 (W.D.N.Y.2002) (emphasis added) (citing *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, Nat'l Assn.,* 731 F.2d 112, 123 (2d Cir.1984) (internal quotation marks and citations omitted)).

[3] Defendants' duty to disclose COBRA information stems not from the Release itself but from section 606 of ERISA. *See* 29 U.S.C. § 1166. That section requires an employer to notify its plan administrator of a qualifying event, such as a termination, within thirty days of that qualifying event. *See id.* § 1166(a)(2). The administrator is then required to notify the qualified beneficiary (the employee) of her COBRA rights within fourteen days thereafter. *See id.* § 1166(c). Here, Equinox had until October 31, 2001, in which to notify its plan administrator of Knoll's termination. The plan administrator then had fourteen days, until November 14, 2001, in which to notify Knoll of her rights under COBRA. Therefore, as of November 1, 2001, Equinox had no legal duty to notify Knoll of her COBRA rights. Although it may have done so earlier, Equinox was not legally obligated to notify Knoll of her COBRA rights until November 14, 2001. Therefore, because no duty of disclosure existed as of November 1, 2001, Equinox's alleged failure to notify Knoll of her COBRA rights cannot support a claim for fraudulent inducement.[FN7]

FN7. Alternatively, plaintiff's fraudulent inducement claim also fails because she has failed to show scienter on the part of Equinox. There is no evidence that Equinox knew of or induced plaintiff's mistaken belief as to the COBRA time limits. Accordingly, plaintiff's unilateral mistake neither supports a finding of scienter nor otherwise justifies rescission of the Release. *See Koam Produce, Inc. v. DiMare Homestead, Inc.,* 329 F.3d 123, 127 n. 3 (2d Cir.2003) (citing *Kraft Foods, Inc. v. All These Brand Names, Inc.,* 213 F.Supp.2d 326, 330 (S.D.N.Y.2002) (" Under New York law, in order for a court to allow rescission of a contract on the basis of a unilateral mistake, a party must establish that (i)[s]he entered into a contract under a mistake of material fact, and that (ii) the other contracting party either knew or should have known that such mistake was being made." (citation and internal quotation marks omitted)).

3. Economic Duress

Plaintiff argues that the Release is unenforceable because Knoll signed it under economic duress. A contract executed under duress is voidable. *See Nelson v. Stanley Blacker, Inc.,* 713 F.Supp. 107, 110 (S.D.N.Y.1989). Economic duress exists where a party is induced to execute a contract: "(1) by means of a wrongful threat precluding the exercise of free will; (2) under the press of financial circumstances; (3) where circumstances permitted no other alternative." *Id.* However, a sophisticated party seeking to void a contract because of economic duress must "do more than merely claim that the other party knew about and used his or her poor financial condition to obtain an advantage in contract negotiations." *Davis & Assocs., Inc. v. Health Mgmt. Servs., Inc.*, 168 F.Supp.2d 109, 114 (S.D.N.Y.2001) (internal quotation marks and citation omitted). As stated by the Second Circuit:

The doctrine of economic duress arises from the theory that " 'the courts will not enforce an agreement in which one party has unjustly taken advantage of the economic necessities of another and thereby threatened to do an unlawful injury." ' *Scientific Holding Co. v. Plessey Inc.*, 510 F.2d 15, 22 (2d Cir.1974) (emphasis omitted) (quoting *Nixon v. Leitman,* 32 Misc.2d 461, 224 N.Y.S.2d 448, 452 (Sup.Ct.N.Y.Co.1962)). Under New York law, "[a] contract or release, the execution of which is induced by duress, is voidable." *DiRose v. PK Mgmt. Corp.*, 691 F.2d 628, 633 (2d Cir.1982); *see also Scientific Holding Co.*, 510 F.2d at 23. However, "the person claiming duress must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so." *DiRose,* 691 F.2d at 633-34; *see also Scientific Holding Co.*, 510 F.2d at 23; *International Halliwell Mines, Ltd. v. Continental Copper and Steel Indus., Inc.*, 544 F.2d 105, 108 (2d Cir.1976). If the releasing party does not promptly repudiate the contract or release, he will be deemed to have ratified it. A party may ratify a contract or release entered into under duress by "intentionally accepting benefits under the contract," by " remaining silent or acquiescing in the contract for a period of time after he has the opportunity to avoid it," or by "acting upon it, performing under it, or affirmatively acknowledging it." *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir.1989) (internal quotation marks and citation omitted).

*8 *VKK Corp. v. National Football League,* 244 F.3d 114, 122 (2d Cir.2001) (footnote and parallel citations omitted).

[4] Although Equinox may have been aware of Knoll's financial circumstances at the time of her termination, there is no evidence that it used this information as leverage during the Release negotiations. Nor is there any evidence that Equinox has threatened Knoll with an unlawful injury. Without a wrongful threat by Equinox, Knoll's economic duress argument fails as a matter of law and must be dismissed.

4. Repudiation/Ratification

Plaintiff claims that she promptly repudiated the Release when she filed a Charge of Discrimination with the EEOC on March 19, 2002. Plaintiff also claims that Equinox repudiated the Release when it took a credit for the premiums paid on Knoll's behalf in March of 2002. Neither of these actions show an intent to repudiate the Release by either party. Knoll's filing of a Charge of Discrimination has nothing to do with her decision to continue to accept the benefits conferred by the Release. As discussed above, the credit taken by Equinox was the result of delayed or missed communications with its insurance carrier, not an attempt to repudiate the Release.

Knoll did not repudiate the Release after the source of her emotional duress-the need for health insurance coverage to pay for her reconstructive surgery-was removed. *See Kovian v. Fulton Co. Nat. Bank and Trust Co.*, 857 F.Supp. 1032, 1039 (N.D.N.Y.1994) ("[O]nce the duress is removed, the party claiming duress must choose either to promptly repudiate the contract or to acquiesce to its terms pursuant to the doctrine of ratification"). Nor did Knoll repudiate the agreement after learning of Equinox's alleged breach in February 2002. Knoll ratified, rather than repudiated, the Release when she completed and signed an Extension of Coverage form on March 1, 2002, four months after executing the Release, and accepted Equinox's retroactive reinstatement of coverage. *See VKK Corp.*, 244 F.3d at 125 (stating that a party challenging a release on grounds of economic duress is "required to challenge its validity promptly after [its] execution, or not at all"); *De Palma v. Really IQ Corp.*, No. 01 Civ. 446, 2002 WL 461647, at *4 (S.D.N.Y. Mar.25, 2002) (stating that the simple act of "retaining consideration after learning that a release is voidable operates to ratify the release") (internal quotation marks and citation omitted).

[5] By accepting these benefits, Knoll ratified what may have arguably been a voidable contract and effectively made a new promise and affirmed her own legal duty to release Equinox from any and all causes of action. Rescission is not appropriate where the party seeking rescission has ratified the contract. *See Banque Arabe v. Maryland Nat. Bank,* 850 F.Supp. 1199, 1212 (S.D.N.Y.1994) ("By ratifying a contract, the party waives the right to rescind."). Accordingly, neither of the acts alleged by Knoll to justify rescission-her filing of a Charge with the EEOC and the credit purportedly taken by Equinox-serve to repudiate the previously ratified Release.

C. Defendants' Counterclaim

***9** Defendants claim that plaintiff breached the Release by filing a Charge of Discrimination with the EEOC and bringing the instant action. Defendants have counterclaimed for damages including but not limited to the cost of defending the instant action, including attorneys' fees.

The so-called "American rule" generally prohibits a party from recovering attorney's fees and costs incurred in litigation absent a specific statutory or contractual provision. Plaintiff points out that the Release contains no provisions for attorney's fees in the event of a breach. *See Bellefonte Re Ins. Co. v. Argonaut Ins. Co.,* 586 F.Supp. 1286, 1288 (S.D.N.Y.1994) ("[A]bsent contractual language to the contrary, a party who brings an action which is ultimately held to be in breach of a covenant not to sue, but which was based on a reasonable and good faith argument either that the covenant did not bar the suit or that the covenant was obtained by unfair means, is not liable for his opponent's litigation expenses."). According to the Second Circuit, recovery of such costs is largely a question of intent. *See Artvale, Inc. v.. Rugby Fabrics Corp.,* 363 F.2d 1002, 1008 (2d Cir.1966) (finding litigation expenses to be unrecoverable notwithstanding the breach of a covenant not to sue because such recovery was not contemplated by the parties). Intent may be established by the inclusion of language indicating that a breach will entail liability for damages, including attorneys' fees. *See id.* ("Certainly it is not beyond the powers of a lawyer to draw a covenant not to sue in such terms as to make clear that any breach will entail liability for damages, including the most certain of all-defendant's litigation expense. Yet to distill all this out of the usual formal covenant would be going too far; its primary function is to serve as a shield rather than as a sword ... In the absence of contrary evidence, sufficient effect is given the usual covenant not to sue if, in addition to its service as a defense, it is read as imposing liability only for suits brought in obvious breach or otherwise in bad faith.).

[6] Here, defendants did not expressly state their intention to impose damages if the Release were breached. Moreover, plaintiff had a reasonable, good faith basis in arguing that the Release was invalid and/or unenforceable. For these reasons, defendants' claim for litigation costs is dismissed.

IV. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted and this case is dismissed. The Clerk of the Court is directed to close this case.

S.D.N.Y.,2003.
Knoll v. Equinox Fitness Clubs
Not Reported in F.Supp.2d, 2003 WL 23018807 (S.D.N.Y.), 32 Employee Benefits Cas. 1747, 9 Wage & Hour Cas.2d (BNA) 499

Briefs and Other Related Documents (Back to top)

• 1:02cv09120 (Docket) (Nov. 15, 2002)

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Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.
BENEFIT CONCEPTS NEW YORK, INC., Plaintiff,
v.
BENEFIT CONCEPTS SYSTEMS, INC., Donald M. Israel, Mark R. Taylor, and David B. Weinstock, Defendants.
Donald M. ISRAEL and Mark R. Taylor, Third-Party Plaintiffs,
v.
Daniel CARPENTER, Third-Party Defendant.
No. 93 Civ. 1961 (DLC).

March 28, 1995.

Jack E. Robinson, New York City.
Mitchel J. Shornick, Fischer Weisinger Caliguire & Porter, Englewood Cliffs, NJ.

MEMORANDUM AND ORDER

FRANCIS, United States Magistrate Judge.
*1 This case arises from the aftermath of a "business divorce" and concerns the distribution of assets, including the allocation of trademark rights. The parties have consented to my jurisdiction for all purposes pursuant to 28 U.S.C. § 636(c). All parties have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and at my request they have also briefed the issue of this Court's subject matter jurisdiction.

Background

Beginning in 1985, Daniel E. Carpenter, Donald M. Israel, Mark R. Taylor, and David B. Weinstock conducted an insurance brokerage and employee benefit consulting business under the name of Benefit Concepts, Inc., which was subsequently changed to Benefit Concepts New York, Inc. ("BCNY"). On September 3, 1991, the principals entered into an agreement dividing the assets of the enterprise among themselves (the "Buyout Agreement"). Complaint, Exh. E. Pursuant to Buyout Agreement, Mr. Israel and Mr. Taylor bought all of Mr. Carpenter's shares in an entity called Benefit Concept Systems, Inc. ("BCSI"), while Mr. Carpenter purchased all of the shares of BCNY, which held the rights to the trademarks at issue here. At the same time, Mr. Carpenter and BCNY licensed use of the names "Benefit Concepts," "Benefit," "Concepts," and "Benefit Concepts Systems" to Mr. Israel and Mr. Taylor for the nominal consideration of one dollar. The license was for one year, renewable at the option of the licensees for successive one year terms. The Buyout Agreement also divided the existing accounts among the parties.

Like many divorces, this one was less than amicable. Following legal wrangling in other jurisdictions, BCNY initiated suit here in 1993. The complaint includes seven causes of action. In Count I, the plaintiff seeks to have the Buyout Agreement declared void *ab initio* based on alleged breaches by BCSI, Mr. Israel, Mr. Taylor, and Mr. Weinstock. The "most egregious" of these breaches, according to the complaint, was the failure to pay the consideration for the trademark license. Count II alleges that the defendants violated section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1), by infringing BCNY's trade names. In Count III, BCNY asserts that the defendants engaged in unfair competition in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), by using the trade names and thus falsely designating the origin of their services. In Counts IV, V, and VI, the plaintiff pleads pendent state claims of unfair competition, trademark dilution, and unjust enrichment parallel to the federal trademark claims. Finally, Count VII alleges that the individual defendants improperly diverted to themselves commissions to which the plaintiff was entitled.

The defendants answered the complaint, denying the principal allegations. Mr. Israel and Mr. Taylor also filed a third-party action against Mr. Carpenter, alleging that he breached the Buyout Agreement by failing to facilitate their participation in Omega Reinsurance Corporation ("Omega") and National Financial Marketing Group, Inc. ("NFMG"), and by wrongfully withholding their distributions from these two ventures. Mr. Carpenter, in turn, submitted an answer to the third-party complaint together with fifteen different counterclaims ranging from breach of contract to slander. Among his affirmative defenses is the claim that the Buyout Agreement was void on grounds of duress.

*2 The defendants and the third-party plaintiffs then moved for summary judgment. They seek (1) a declaration that the Buyout Agreement is enforceable, (2) an order dismissing the complaint and Mr. Carpenter's counterclaims, and (3) judgment against Mr. Carpenter on the claims asserted in the third-party complaint. The plaintiff and the third-party defendant cross-moved for summary judgment, seeking the relief requested in the complaint and in Mr. Carpenter's counterclaims.

At oral argument, I suggested that I would likely find the Buyout Agreement enforceable and that certain of BCNY's claims would therefore fail. I also indicated that the existence of disputed issues of material fact would probably preclude summary judgment for any party on the claims contained in the third-party complaint.

Shortly after oral argument, I conferred with counsel and advised them that I had some question about the subject matter jurisdiction of the Court. The parties are not diverse, and the federal trademark claims which would give rise to jurisdiction seemed dependent on the resolution of state contract law issues. This set off a flurry of backpeddling by both sides. Because BCNY and Mr. Carpenter were now apparently nervous about the outcome of the summary judgment motions, they sought to paint their own trademark claims as entirely incidental to the contract issues. Conversely, the defendants, who now perceived an advantage to remaining in this forum, tried to characterize the plaintiff's trademark claims as substantial, though not ultimately meritorious.

Discussion

I. *Jurisdiction*

A. *The Schoenberg Test*

In *Schoenberg v. Shapolsky Publishers, Inc.,* 971 F.2d 926 (2d Cir.1992), the Second Circuit established the framework for analyzing whether federal subject matter jurisdiction exists where a plaintiff's federal copyright claims are entwined with state contract law issues such as the enforceability of a licensing agreement. The analysis required by *Schoenberg* applies as well to claims brought under federal trademark law. *See Riddell Sports, Inc. v. Sport Supply Group,* No. 93 Civ.2040 (JSM), 1994 WL 86407, at *2, 1994 U.S.Dist. LEXIS 2909, at *5 (S.D.N.Y. March 14, 1994); *Rosgoscirc ex rel. SOY/CPI Partnership v. Circus Show Corp.,* No. 92 Civ. 8498 (JSM), 1993 WL 277333, at *6, 1993 U.S.Dist. LEXIS 9797, at *18 (S.D.N.Y. July 14, 1993).

Applied to trademark claims, the three-part test mandated by *Schoenberg* may be summarized as follows:

First, the court must determine whether the plaintiff's infringement claim is only "incidental" to the plaintiff's claim seeking a determination of ownership or contractual rights under the trademark. If the infringement claim is only " incidental," there is no subject matter jurisdiction. *Schoenberg,* 971 F.2d at 932.

Second, if the infringement claim is not "incidental," the court must ascertain whether the complaint alleges a breach of a condition to the contract licensing or assigning the trademark or a breach only of a covenant of that contract. If a breach of a condition is alleged, there is subject matter jurisdiction. But if the complaint merely alleges a breach of a contractual covenant in the agreement governing the license or assignment, then there may not be and the court will proceed to the next step. *Id.* at 932-33.

***3** Third, if only breach of a covenant is involved, the court must decide whether the breach is so material as to give the grantor a right of rescission. If the breach would create such a right, there is jurisdiction; otherwise there is not. *Id.* at 933.

In applying this tripartite test, the court is not restricted to analyzing the pleadings. Rather, it may refer to evidence such as affidavits to learn the full nature of the claims. *Id.; Hanna-Barbera Productions, Inc. v. Screen Gems-EMI Music Inc.,* 829 F.Supp. 67, 71 (S.D.N.Y.1993).

B. *Application of the Test*

The trademark claims of BCNY in this case, while closely related to its contract claims, are not merely "incidental" to them. The fact that BCNY has asserted a claim for breach of contract separate from its infringement claim is some evidence that the latter may be merely incidental, but it is not determinative. *See Schoenberg,* 971 F.2d at 933; *Kamakazi Music Corp. v. Robbins Music Corp.,* 684 F.2d 228, 230 (2d Cir.1982). An infringement claim is only incidental where, for example, the core dispute is about the distribution of royalties under a licensing agreement, and determination of the contract issue will be fully dispositive of the plaintiff's demands for relief. *See Hanna-Barbera,* 829 F.Supp. at 71-72; *Living Music Records, Inc. v. Moss Music Group, Inc.,* 827 F.Supp. 974, 980-81 (S.D.N.Y.1993). Similarly, a complaint seeking determination of the ownership of a trademark or copyright but eschewing any claim for damages based on infringement is more likely to be viewed as essentially a contract action. *See Schoenberg,* 971 F.2d at 931.

Here, determination of certain contract issues must precede evaluation of the infringement claims, but it is not necessarily dispositive of those claims. If the license arrangement contained in the Buyout Agreement were void *ab initio* or if BCNY properly terminated it, BCNY would still have to demonstrate its right to relief under the Lanham Act. This would include a showing of infringing use and a determination of damages and would involve application of federal trademark law. The infringement claim here is therefore not merely incidental, and the analysis may proceed to the next stage.

The second prong of the *Schoenberg* test requires a determination whether the plaintiff alleges breach of a condition to, or, on the other hand, a covenant of, the contract. A covenant is simply a promise to perform. "A condition is distinguished from a promise in that it creates no right or duty in itself but is merely a limiting or modifying factor. If the condition is not fulfilled, the right to enforce the contract does not come into existence." 5 *Williston on Contracts* § 663 (3d ed. 1961); *see also Ginett v. Computer Task Group, Inc.,* 962 F.2d 1085, 1099-1100 (2d Cir.1992).

In the complaint in this case, BCNY bases its claim of breach of contract on the defendants' failure to pay the nominal licensing fee. The obligation to pay such consideration is not a condition but is rather one of the mutual covenants in the Buyout Agreement. As to this alleged breach, it is therefore necessary to move to the third element of the *Schoenberg* test and determine whether such a breach is sufficiently material to give rise to a right of rescission. As discussed more fully below, the failure to pay nominal consideration would not permit rescission, and if that were the only basis for BCNY's contract claim, then there would be no subject matter jurisdiction.

***4** However, in responding to the third-party complaint and in briefing the summary judgment motions, Mr. Carpenter also raised a claim of duress. Since a contract must be entered into by willing parties free of coercion in order to be valid, the absence of duress is a condition for enforcement of the contract. Even if duress (or, more precisely, the lack of it) were construed as a covenant, its breach would trigger a right of rescission. *805 Third Ave. Co. v. M.W. Realty Associates,* 58 N.Y.2d 447, 451, 461 N.Y.S.2d 778, 780 (1983). Thus, the *Schoenberg* test leads to the conclusion that the Court has subject matter jurisdiction.

II. *Summary Judgment*

Compared to the jurisdictional questions, the issues raised by the summary judgment motions are relatively straightforward. Since the right to use the trademark depends on the validity of the licensing agreement, the threshold issue is whether the Buyout Agreement is enforceable.

As noted above, BCNY and Mr. Carpenter argue that the Buyout Agreement is void because Mr. Carpenter entered into it under duress. In particular, Mr. Carpenter claims that the defendants subjected him to economic coercion by withholding commissions and expenses to which he was entitled. These allegations, if true, could provide a basis for nullifying the Buyout Agreement.

[A] complaining party [may] void a contract and recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will. The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand.

Id. (citations omitted). Thus, if the defendants were obligated to pay Mr. Carpenter but refused to do so unless he entered into the Buyout Agreement, BCNY and Mr. Carpenter could have an argument for economic duress that would permit them to void the license.

Any such claim here, however, has been waived. "The law is well-settled that a party seeking to repudiate a contract procured by duress must act promptly lest he be deemed to have elected to affirm it." *Sheindlin v. Sheindlin,* 88 A.D.2d 930, 931, 450 N.Y.S.2d 881, 882 (2d Dep't 1982) (citations omitted); *see also Benjamin Goldstein Productions, Ltd. v. Fish,* 198 A.D.2d 137, 138, 603 N.Y.S.2d 849, 851 (1st Dep't 1993); *Stampfel v. Stampfel,* 170 A.D.2d 595, 595, 566 N.Y.S.2d 872, 873 (2d Dep't 1991). In this case, Mr. Carpenter and BCNY performed under the Buyout Agreement from September 1991 until March 1993, when Mr. Carpenter first sought to nullify it. Complaint, Exh. F. Even at that time, although Mr. Carpenter alleged that the defendants had committed "numerous breaches," he did not suggest that he had entered into the contract only under duress. Indeed, the complaint in this action alleges that the "most egregious" breach by the defendants was the failure to pay nominal consideration, and it neglects to mention duress. This issue is raised for the first time in Mr. Carpenter's answer to the third-party complaint, and that is too late.

*5 The argument of BCNY and Mr. Carpenter that the license was vitiated by the defendants' failure to pay nominal consideration is also without merit.

It is well-established that where, as here, the non-performance of one party to a contract is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance, then the breaching party has substantially performed its obligations. In such a case, the non-breaching party is not excused from its responsibilities under the contract.

Le Cordon Bleu, S.A. v. BPC Publishing Ltd., 451 F.Supp. 63, 71 (S.D.N.Y.1978) (citations omitted); *see also Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., Inc.,* 205 A.D.2d 412, ----, 613 N.Y.S.2d 622, 624 (1st Dep't 1994). Here, the payment of one dollar for the license to use the trade names was only one of many covenants contained in the Buyout Agreement. The failure to pay that amount is insignificant and does not entitle BCNY to rescind either the license alone or the Buyout Agreement as a whole.

From these findings it follows that the license is valid, and the plaintiff's federal trademark claims are therefore meritless. The defendants are accordingly entitled to summary judgment on counts II and III of the complaint.

III. *Supplemental Jurisdiction*

This analysis brings us full circle to another question of jurisdiction: if summary judgment is granted dismissing the federal claims, does the Court retain jurisdiction over the state claims? Supplemental jurisdiction is governed by 28 U.S.C.

§ 1367(a), which generally provides that where a district court has original jurisdiction over at least some claims in a case, it may exercise jurisdiction over related state claims that form part of the same case or controversy. Nevertheless,

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if- ...

(3) the district court has dismissed all claims over which it has original jurisdiction....

28 U.S.C. § 1367(c).

Here, the federal claims are being dismissed on summary judgment, and it is therefore within the Court's discretion to dismiss the state claims for want of jurisdiction. *See Pearson v. Ford Motor Co.,* 865 F.Supp. 1504, 1515 (N.D.Fla.1994) (pendent state claims dismissed after summary judgment granted dismissing federal claims); *Reynolds v. Mercy Hospital,* 861 F.Supp. 214, 223-24 (W.D.N.Y.1994) (same); *Beal v. City of New York,* No. 92 Civ. 0718 (KMW), 1994 WL 163954, at *6, 1994 U.S. Dist. LEXIS 5269, at *24 (S.D.N.Y. April 15, 1994) (same); *cf. Rhyne v. Henderson County,* 973 F.2d 386, 395 (5th Cir.1992) (pendent state claims dismissed after directed verdict on federal claims). "Factors to be considered by the court include (1) the length of time the matter has been pending before the federal court; (2) the proximity of the trial date; and (3) the predominance of issues of federal, as opposed to local, concern." *Drexel Burnham Lambert v. Saxony Heights Realty,* 777 F.Supp. 228, 240 (S.D.N.Y.1991).

***6** Here those factors militate in favor of dismissing the state claims. The case has been pending in this Court barely two years. Neither the third-party claims nor Mr. Carpenter's counterclaims are ready for trial, and the third-party plaintiffs have requested additional time for discovery. As discussed above, the state contract claims are clearly dominant, and the third-party plaintiffs initially filed their claims in state court before resubmitting them here. Finally, the interests of judicial efficiency would not be served by my retaining jurisdiction, since I have explored the state law issues only as far as necessary to determine the validity of the federal trademark claims. " 'In the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims.' " *Morse v. University of Vermont,* 973 F.2d 122, 127-28 (2d Cir.1992) (quoting *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 n. 7 (1988)). This is such a case.

Conclusion

For the reasons set forth above, I find that the Court has subject matter jurisdiction over the plaintiff's federal trademark claims but that these claims are without merit. Accordingly, the defendants' motion for summary judgment is granted to the extent that Counts II and III of the complaint are dismissed with prejudice. I further find that it is appropriate to decline to exercise supplemental jurisdiction over the remaining state claims. Accordingly, Counts I, IV, V, VI, and VII in the complaint as well as all claims in the third-party complaint and all counterclaims to the third-party complaint are dismissed without prejudice. The Clerk of Court shall enter judgment accordingly.

SO ORDERED.

S.D.N.Y.,1995.
Benefit Concepts New York, Inc. v. Benefit Concepts Systems, Inc.
Not Reported in F.Supp., 1995 WL 133773 (S.D.N.Y.)

Briefs and Other Related Documents (Back to top)

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